

THE GO-BETWEEN

**The Film Archive as a Mediator
Between Copyright and Film Historiography**

by

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ABSTRACT

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The Film Archive as a Mediator Between Copyright and Film Historiography

by Claudy Wilhelmina Elisabeth Op den Kamp

Based on the premise that only in being accessible can the film reach its potential for history making, the contribution of the film archive to a particular film historical narrative is fragmented: the films that are extant are not necessarily available and the ones that are available are not necessarily publicly accessible. The contention of the thesis is that ‘doing’ film history in the context of the film archive should always be seen in light of an ever increasingly narrowing fragmentation of accessible material that takes place in the film archive.

What is new about the contribution of this thesis is not that the film archive can be seen simultaneously as a result of a particular historical narrative as well as contributing to one, but that this debate is put in the context of copyright as a determining factor of why the accessible part of the film archive is only a partial picture. To this end, the thesis proposes a reorganisation of existing categories of analysis in the form of a cross-section of the film archive based on copyright ownership plotted against the material’s ‘availability’.

By such practices as using a risk-managed approach to copyright clearance for archival digitisation projects, the film archive can be seen to act as a mediator between copyright and film historiography. On the one hand, the film archive is subjected to copyright law, against the constraints of which it can be seen to resist. On the other hand, the archive makes productive use of copyright in its involvement in the interplay between the ownership of the physical objects and the ability to control the subsequent use and dissemination of those objects. Some of these resistant and productive practices, such as found footage filmmaking as a historiographic intervention and providing access to public domain material, are analysed in the context of some of the digital access practices of EYE Film Institute Netherlands between 2002-2005, in which the film archive can be seen to actively shape access to its film archival holdings as well as a particular potential for film history writing.

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AUTHOR'S DECLARATION AND WORD COUNT

At no time during the registration for the degree of Doctor of Philosophy has the author been registered for any other University award without prior agreement of the Graduate Committee.

Work submitted for this research degree at Plymouth University has not formed part of any other degree either at Plymouth University or at another establishment.

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Publications

Book Chapters (refereed)

Op den Kamp, C. (2015) 'Audiovisual Archives and the Public Domain: Exclusive Control, Digital Access and the Dynamics of History', in: Crisp, V. and Menotti, G. (eds.) *Besides the Screen: Moving Images Through Distribution, Promotion and Curation*. Basingstoke: Palgrave Macmillan, pp. 147–161.

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Papers Presented

2015, 'Testing "Digital Desmet"', The Colour Fantastic: Chromatic Worlds of Silent Cinema, EYE Film Institute Netherlands, NL, 31 March

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2013, Invited Talk, 'Found Footage, Legal Provenance and the "Aesthetics of Access"', XI MAGIS International Film Studies Spring School, Gorizia, IT, 21 March

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2013, 'Audiovisual Archives and the Orphan Works Problem / DE OVERVAL, 10 years later', XX International Film Studies Conference, Udine, IT, 13 March

2012, 'Found Footage, Legal Provenance and "Aesthetics of Access"', Besides the Screen Symposium, Goldsmiths College, London, UK, 2 December

2011, 'Taking Stock', The Current and Future State of Moving Image Archival Education, Panel, AMIA Annual Conference, Austin, US, 18 November

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2010, 'Is Audiovisual Archival Public Domain Material Really Freely Available?', Besides the Screen Symposium, Goldsmiths College, London, UK, 21 November

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Conferences and Festivals Attended

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The Colour Fantastic: Chromatic Worlds of Silent Cinema, EYE Film Institute Netherlands, NL, 29-31.03.2015

Keeping Within the Lines: Legal and Creative Approaches to Copyright in Art and Design Archives, London Metropolitan Archives, UK, 13.03.2015

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Le Giornate del Cinema Muto, Pordenone, IT, 04-11.10.2014

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ARRI Archive Workshop, Munich, GE, 03-04.06.2014

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Le Giornate del Cinema Muto, Pordenone, IT, 05-12.10.2013

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Il Cinema Ritrovato, Bologna, IT, 29.06-06.07.2013

Sage IP Symposium, Durham University Institute for Advanced Study, Durham, UK, 29-06-30.06.2013

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Play & Prosume, schleichender Kommerz und schnelle Avantgarde, Vienna, AT, 06-17.03.2013

XX International Film Studies Conference, Udine, IT, 12-14.03.2013

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AMIA (Association of Moving Image Archivists) Annual Conference, Austin, US, 16-19.11.2011

Il Cinema Ritrovato, Bologna, IT, 25.06-02.07.2011

EFG Symposium – 'Film Archives and Their Users in the "Second Century" – Risks and Benefits of the Transition to Digital', Bologna, IT, 30.06-01.07.2011

EFG Symposium – 'Taking Care of Orphan Works', Amsterdam, NL, 30-31.05.2011

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UCLA ‘Reimagining the Archive’ Symposium, Los Angeles, US, 12–14.11.2010

AMIA / IASA (International Association of Sound and Audiovisual Archives) Joint Conference, Philadelphia, US, 02–06.11.2010

Open Video Conference, New York, US, 01–02.10.2010

BCLA (British Comparative Literature Association) ‘Archive’ Conference, Canterbury, UK, 05–08.07.2010

Orphan Film Symposium, New York, US, 07–10.04.2010

VIII MAGIS - International Film Studies Spring School, Gorizia, IT, 19–25.03.2010

XVII International Film Studies Conference, Udine, IT, 16–18.03.2010

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International Copyright Law Affecting the Footage Industry, CYFLE, Cardiff, 01.09.2010

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PROTTEC Summerschool, Strengthening Human Capabilities, UoP, 21–25.06.2010

PG Society Short Conference Series, UoP, 17.06.2010

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Transtechnology Research Seminar, 'Realism and Its Discontents' (Reel Laws; Bits & Pieces), 19.05.2010

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Transtechnology Research Seminar, 'Realism and Its Discontents' (Scientific Film, Filming Science / Colour Film Restoration), 16.12.2009

Introduction to Endnote (Arts & Humanities), UoP, 01.12.2009

Research Dialogue 'The Research Question', UoP, 24–25.11.2009

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2014, KTI DIASTOR conference 'Film im Digitalen Zeitalter', Zurich, CH, 5 and 6 June [layout, editing].

2013, Humanities in the European Research Area (HERA) Knowledge Transfer (KT) Event '*Reclamekermis*: advertising the sublime', EYE Film Institute, Amsterdam; Institute for Sound and Vision, Hilversum, NL, 19 and 20 April [overall producer].

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Signed.....

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Martin Scorsese laat in zijn documentaire over de Italiaanse cinema zien dat je de films waarvan je houdt, de films die je leven mede hebben bepaald, ook kunt begrijpen als een soort autobiografie.

Arnon Grunberg

(Buster Keaton lacht nooit. Amsterdam: Nijgh & Van Ditmar, 2013)

INTRODUCTION

From the first day in the film archive, one thing was clear to me: the history of film books, cinemathèque programmes and film cycles on television only little resemble the history that is housed in a film archive. In an archive, film history constantly falls apart into jigsaw puzzle pieces that just do not want to fit together. The marginal is the norm. Moreover, film history is fragmented in an even more bewildering way. No film is still complete or intact; time has eaten everything. Even if a roll of film in a strange twist of fate has passed the voracity of time without significant damage, it still seems like that film originates from another planet - in any case not from the planet that you previously thought was film history - Peter Delpout (1997, p. 7).

Arguably every film archivist runs into this tension upon starting to work in a film archive: where is the film history that I thought I knew? And if it is not here, where is it? And what is it that *is* here? (And what can we possibly do with what is here?) This introductory chapter will use the discrete elements of the thesis' title to elucidate the subject, its premises and the interdependence of the different debates relating to the film archive, copyright as a filter that shapes the availability and public accessibility of archival film, and film history writing. In the widest sense this thesis argues that the film archive, as a site of fragmentation, can be seen as a mediator between copyright and film historiography. Ultimately, it is the particular interdependent relationship between the debates where the thesis will make a contribution.

The primary purpose of this study is to examine the relationship between the film archive, copyright and film historiography based on not only what filmic evidence is kept in the film archive but more importantly how much of that evidence is available and publicly accessible. What is important to flag up in the beginning of

the thesis is that film history is more than the history of films. Moreover, not all kinds of film history are written based on archival material nor are they all written within the context of the film archive. Those histories will *not* be the focus of this thesis. In this thesis, film history will be considered selectively, in terms of what the film archive can be seen to contribute to a history that focuses on the archival film, such as a text-oriented film history. By analysing the intertwined and interdependent relation between copyright and film historiography, the project calls attention to the film archive as a mediator between copyright and film historiography and therefore as one of the contingencies that co-constructs that certain kind of film history.

Based on the premise that only in being accessible can the film reach its “potential for history making” (Jones, 2012, p. 109), the contribution of the film archive to a particular film historical narrative is fragmented: the films that are extant are not necessarily available and the ones that are available are not necessarily publicly accessible. The term fragmentation throughout this thesis is meant to signify the process in which an ever increasingly narrowing hierarchy of extant, potential available and publicly accessible material takes place. This process includes considerations of institutional factors, such as restoration practices, but also copyright, in itself a historically contingent concept, can be seen to shape film archival access and therefore has consequences for the films’ potential for history making. On the one hand, the film archive is subjected to copyright law, against the constraints of which it can be seen to resist. On the other hand, the archive makes productive use of copyright in what Law professor Ronan Deazley (2006, p. 124) has termed its “involvement in the interplay between the ownership of the physical objects and the ability to control the subsequent use and dissemination” of those objects. The archive’s resistant and productive practices will be elucidated in chapters that focus

on public access to the orphan film, the public domain film as well as a particular artistic intervention of re-using archival film. The artistic intervention, both within and outside of the film archival institution, is a contemporary practice that can be seen as resistant and revisionist in nature as it challenges film history, the way that history has been written as well as the institutional role of the film archive in constructing that film history. The contention of the thesis is that ‘doing’ film history in the context of the film archive should always be seen in light of a certain fragmentation of accessible material that takes place in the film archive.

What is new about the contribution of this thesis is not that the film archive can be seen simultaneously as a surviving structure of past processes (Gaddis, 2002) as well as contributing to new ones, but that this debate is set in the context of copyright as a determining factor of why the accessible part of the film archive is only a partial picture. Copyright ownership can be seen as an important filter that shapes the availability and public accessibility of archival film, and is currently inflected by digitisation and a focus on public access to the archive based on new funding structures. The concept of copyright ownership as a focus for analysis of archival access and the repercussions for film historiography¹ is an under-researched topic and has not been the subject of a focused examination as a particular filter for the construction of film history before. The two topics can be seen to be part of two discrete bodies of literature: the legal and the film archival one. By recontextualising the discrete bodies of literature, the thesis will contribute to bridging the gap between them. Certain frameworks of meaning are constructed in access to films only. What initially can seem like a local and an exclusively legal problem can be seen in a larger

¹ Throughout this thesis, film historiography is understood to be both a reflection on the writing of film history (how it is constructed) as well as the history of ‘film history writing’, which in turn needs to be understood as a practical expression.

context as an ontological and epistemological problem, in terms of the larger constraints to history. It therefore resonates beyond the specific demarcation of the film archive.

The chapter's first section, 'the film archive', will provide an introduction to the concept and definition of a public sector national film archive as it will be used throughout the thesis, with a focus on its practices as well as the material reality of its heterogeneous collections. It will also lay out the motivations behind selecting the specific archive the thesis will use as a site of tension.

Based on the assertion that copyright ownership can be seen to shape film archival access and therefore has consequences for the films' potential for history making, the following section, entitled 'copyright ownership', will focus on the need the research has identified for a 're-categorisation' of archival holdings based on their copyright ownership status. The result of this re-categorisation are four quadrants, which highlight such concepts as 'orphan works' and 'the public domain' that play a vital role in the later analysis, and will frame chapters two, three and four of the thesis.

The following section, 'the film historical narrative' will address the filmic evidence that film archives have collected, restored and provided access to over the course of the years as a basis for film history writing. Building film collections has been informed by an ideal of inclusivity and a drive towards completism yet consists of a rather small number of films. The section will address some of the reasons for the partial picture of 'evidence' the film archive can be seen to contribute to a specific film historical narrative. This introductory chapter will conclude with a section on the structure of the thesis, subdivided into descriptions of the individual chapters.

The Film Archive

This section will highlight some of the possible types of film archives as well as some of their main activities. It will also address what specific kind of film archive this thesis will focus on and why. In the book in which she traces the institutional history of mainly the British Film Institute, *Keepers of the Frame*, Penelope Houston (1994) notes that film archives manifest themselves in many different forms:

Film archives, by their historical nature, come in all shapes, scales and sizes, have varying policies and remits ... Many, for example, have relatively large, eclectic, international collections of which the national production represents only a proportion of the whole; some others concentrate more, in varying degrees, on caring for the films of their own country. (Houston, 1994, p. 165)

Film archives do not only differ in their origins and sizes but also in their organisational structures and funding. Chief curator of the EYE Film Institute Netherlands (hereafter: EYE) Giovanna Fossati (2009) describes in the introduction of *From Grain to Pixel* some of the possibilities: they can be funded publicly, privately or in some other way that is a combination of the two. Some of these organisational structures might have direct consequences for the composition of their respective collections, as the holdings of most public archives can be characterised by a more or less national or regional focus, for instance, whereas the holdings of most privately held archives seem to be characterised by copyright ownership. As a legal cross-section of a film archive will highlight in later chapters, public sector institutions usually own the copyright to only a small portion of their collections, with the majority of the holdings owned by an external party.

Initially, “waves of collective destructions” (Borde, 1983, p. 18) were some of the major motivations for the emergence of film archives, including the replacement of silent film by sound film in the 1930s and the abandonment of the inflammable

nitrate film stock in favour of acetate film stock in the 1950s. The ways collections were built are not always equally clear: early decades of film archiving go hand in hand with stories of secrecy, of, as Houston (1994, p. 3) describes “material of uncertain provenance, as well as films picked up from private collectors or from outside the system of heavily policed industry control. The safest policy was to keep quiet and attract no unwelcome attention”. One of the factors that allegedly made the archivists secretive about their holdings was the fear of rights holders, the relationship with whom will be unpacked in more detail in chapter two.

Historically, but also currently, large parts of archival holdings can be seen to have been compiled relatively randomly; they often start as ‘stuff’ arriving at the archive’s door, which can make for quite heterogeneous collections. A film archive’s collection is commonly not a collection of just films. And that part of the collection that consists of films is for the largest part not made up of exclusively complete titles. It can consist of, amongst others, multiple versions of the same title, scene outtakes, unedited camera negatives, incomplete films, and even film fragments, some of which unidentified. Aside from film, the archive might also collect and acquire non-film or film-related holdings, such as projectors, posters, film stills, filmmakers’ paper archives or even film props and cinema decors. The holdings usually comprise innumerable types of different formats, only some of which have become industry-wide standards. Some others will be no longer playable.

What is important in the context of what will follow in later chapters is the haphazard nature of how the archive’s collection is sometimes seen to be shaped. The archival collection is built up by “chance elements, such as grants, discoveries or acquisitions, [as well as] by the personality of the curator” (De Kuyper, 2013, p. 127). There are also more intentional factors that shape the collection: countries such as

Denmark and France have adopted a mandatory legal deposit system (Gorini, 2004), for instance, which entails that a designated national archive receives copies of those audiovisual works that have received national or governmental funding in order to build a national patrimony. Other countries like the Netherlands do not have a legal deposit system for film but the archive's intentional selection, acquisition and exchange choices also shape the collection. Distributors tend to systematically deposit multiple copies of (feature) films in the film archive after their theatrical run is over. Donations or deposits can be large parties, of which the rights are usually not transferred (Rother, 2014), and often there is not enough manpower to immediately identify and catalogue the material correctly. The haphazard nature of how collections are shaped and a seemingly perpetual backlog means that the origins of notably older parts of collections will not always be clear, which has immediate implications for locating copyright holders at a later stage.

The main tasks of a film archive can be boiled down to two categories of work and are in tension with each other. In his contribution to the edited volume *75000 Films* (2013, p. 122), film historian and former deputy director of the Nederlands Filmmuseum Eric de Kuyper states that “two basic tasks are at odds with each other in a film archive: preservation and access”. The two missions are by definition conflicting, so some archives have radically chosen to focus on one exclusively to the detriment of the other. The classic tension is often portrayed as personified by Ernest Lindgren and Henri Langlois, curators of the National Film Archive (UK) and the Cinémathèque française respectively. Lindgren is associated with the preservation side of the tension:

Preservation, which had been one goal among several, began to seem the only thing that really mattered. Everything was being done in the interests of posterity, and there was no suggestion that posterity was expected to put in an

appearance during the next ten years, or even the next fifty. (Houston, 1994, p. 44)

Langlois, a collector at heart, has been traditionally associated with the access component of the tension. Programming and showing films were the most important goal of film archiving for him, even if it meant it was done at the expense of preserving the films:

And like most collectors he chose to display his treasures on his own terms, would otherwise prefer secrecy about just what he had and where he kept it. Scribbled lists of films were to be preferred to more orthodox records; he was said not to be above such dodges as slipping films into wrongly labeled cans. An archive, he once said, was like a bank, a Swiss bank, of course, with an obligation to maintain confidentiality about its holdings in the interests of its depositors (whether of cash or of films). (Houston, 1994, p. 49)

What is important to note in the light of this thesis is that in the last few decades, preservation and access have become to be seen as two sides of the same coin. A key point in the change is that there has been a shift to digital culture arguably driven by funding imperatives, which means that funding for preservation is often linked with an obligation to provide archival access, which in turn now appears to be synonymous with digital and online access (Cherchi Usai, 2009). Whereas archival access in previous decades meant screening programmes, museum exhibitions and on-site study, there is now, as Information Policy Consultant and Copyright Officer of the UK National Archives, Tim Padfield (2010, p. 208) states, an “expectation not merely from the public but also from their political representatives that the collections of publicly funded institutions will be accessible to view and to study online”. Through their preservation and access strategies, for instance, film archives can be seen to actively shape the many particular narratives that can be told. As senior curator of EYE Mark-Paul Meyer (2011) illustrates, the re-evaluation of colour in early cinema by ways of new restoration techniques, for instance, can be seen as a classic example.

In this thesis it will be the specific role of copyright ownership that will be used to ‘re-categorise’ the film archival collection in order to unravel the particular access activities the film archive can be seen to actively shape. Based on those access activities, every chapter throughout this thesis will highlight a different notion of the film archive that can be construed.

Specific Focus: EYE Film Institute Netherlands

In order to demarcate what would otherwise be too vast a landscape of possibilities, both archival and legal, the choice has been made to frame the thesis around one specific country, the Netherlands. Copyright law has long been the object of international regulation. The Berne Convention (1886) was the first attempt at harmonising international copyright legislation. The UK was part of a small group of countries that first approved the treaty. The Netherlands entered in 1912; but the US, for instance, did not join until 1989. Despite this one, as well as numerous more recent initiatives, important differences continue to exist between countries and copyright is essentially still national law. In a thesis that focuses on the potential impact of copyright ownership on film archival access and its relation to film historiography, one country with one jurisdiction seemed preferable as a demarcation.

In this thesis the focus will be in particular on the so-called official national film archive of the Netherlands: EYE. Sector institution for Dutch cinema and the national museum for film, EYE, which is a merger of four other institutions, including the former Nederlands Filmmuseum, set up in 2010² is one of two national audiovisual archives in the Netherlands. The other institute is the Netherlands

² The four institutions are the Nederlands Filmmuseum, Holland Film, the Filmbank, and the Netherlands Institute for Film Education. <https://www.eyefilm.nl/en/about-eye> (last accessed: 3 September 2014).

Institute for Sound and Vision, the largest national audiovisual archive and its collection mainly encompasses television and radio holdings. The Netherlands has also several regional archives; some are exclusively audiovisual, others include, next to their other holdings, audiovisual collections. Partly subsidised with public money (Fossati, 2009), and like all other International Federation of Film Archives (FIAPF) member archives a non-profit institution, the national film institute is focused on collecting, preserving, restoring and providing access to its collections, film and otherwise. EYE has different kinds of legal issues than, for instance, a commercial archive. Whereas a commercial archive will most probably own the copyright to the large majority of its holdings, EYE, as a national public institution hardly owns any of the intellectual property of its holdings, but has, however, many physical holdings. The dichotomy between the intellectual ownership and the physical ownership of archival material and the resultant tension for access can be illustrated clearly in the case of a public institution with its specific remit and practices of film preservation and dissemination.

The chapters of the thesis will be illustrated with film examples from the context of EYE and will have international connections that touch upon several other jurisdictions and legal systems. Although the specific way the Dutch national archive is governed or the enormous funding opportunities³ for film preservation that were available in the Netherlands over the last few decades might not be representative for regional and some other national archives, the underlying legal issues to some of the examples used in the following chapters will be representative of other archives' issues. Films may, for example, be deposited in the archive under embargo, while

³ An example is the 7-year digitisation programme Images for the Future (<http://beeldenvoordetekomst.nl/en.html>), largest digitisation effort in Europe to date, about which more in later chapters.

there might be a mandate to preserve and to provide access to the film holdings. Or films might have untraceable rights owners and the archive will be faced with the risk analysis based on which it will choose to go ahead or not with a particular re-use. Or films might be in the public domain and provide an opportunity for exploitation. All of these scenarios might be problematic and the problems will be exacerbated when set in an international context.

Partly because of its large quantity of non-canonical holdings, EYE has been instrumental in the rewriting of film history based on what has been made available throughout the last few decades. As Giovanna Fossati writes in her 2009 publication *From Grain to Pixel*,

deputy directors Eric de Kuyper first, and Peter Delpeut later, encouraged restoration and presentation practices that were mainly moved by the aesthetic value of films rather than by their historical relevance. ‘The institute led in this way the development of a new film historical canon’, as Bregt Lameris writes (2007: 75). From this perspective, the focus shifted from the celebrated centerpieces of official film history to its margins. (Fossati, 2009, p. 172)

Most of the archival holdings of EYE are part of these margins, as it holds less canonical titles than other large national archives might do. The case of the Nederlands Filmmuseum, which in the late 1980s and early 1990s centred on (the aesthetics of) its own archival collection, instead of the established canon, will be used as a historical example of a ‘return’ to the archival film as a primary source in order to challenge previously held ideas of what film is in chapter one. Lee Tsiantis, Corporate Legal Manager at Turner Broadcasting (quoted in *self-styled siren*, 2010) emphasises that legal issues that prevent distribution of a film “rarely have anything to do with the type of film in question”, which will also be one of the underlying reasons for a re-categorisation of the film archival holdings in the next part of this chapter. So although the holdings of EYE might not be representative of those of

other national archives more generally, their legal problems might still be seen as representative.

According to Tim Padfield, “[t]wenty years ago, few cultural sector institutions regarded copyright as a significant issue or employed staff to deal with it” (2010, p. 209). Starting in 2007, EYE was a principal partner in the 7-year national digitisation project ‘Images for the Future’ during which there was a legal team in place, which at its largest consisted of four full-time employees. EYE has been at the vanguard of archival legal research and has been a partner in several international initiatives, including leading the work package dedicated to copyright issues in the European Film Gateway (EFG) project and FORWARD, a Framework for an EU-wide Audiovisual Orphan Works Registry, about which more in chapter three. It is therefore an ideal choice as a place of scrutiny.

After chapters two, three and four of the thesis will lay out the consequences of a cross-section of the archive based on the copyright ownership of its holdings, an artistic intervention that can be seen as a contemporary practice of a ‘return’ to the archival film as a primary source, will be presented in chapter five. EYE has had a long and interesting history when it comes to found footage filmmaking. Not only have numerous filmmakers, such as Gustav Deutsch and Bill Morrison, been invited to work with the film collection, but works by them and other filmmakers have also been acquired for the permanent collection. The chapter will examine in detail the relationship between copyright ownership and the re-use of archival film within an institutional archival context in order to unpack a specific element of the interrelationship between copyright, the film archive and film history.

EYE has been able to hold on to the ‘experimental attitude’ that was characteristic of the Nederlands Filmmuseum. According to filmmaker and former

deputy director of the Nederlands Filmmuseum Peter Delpout (*In memoriam Hoos Blotkamp*, 2014), in response to the opening of the Orphan Film Symposium in March 2014 in EYE: “technical knowledge, fortitude of content and above all creative forms of presentation still characterise the work of the current staff”⁴, which includes inviting artists to re-use the collection creatively as well as finding new and creative ways to present their own collection. Human agency and deciding to develop certain access initiatives will turn out to be an important factor when it comes to analysing film archival access and the potential for history making of what is publicly made accessible.

A last remark in the context of choosing EYE as a specific demarcation is the use of both the names Nederlands Filmmuseum and EYE in this thesis. Both names will be used alongside each other, highlighting the precise timing of the events explained; Nederlands Filmmuseum will be used to indicate the institute from before 2010; EYE will be used to indicate the time period after 2010, at which point the Nederlands Filmmuseum merged with three other institutions to become the sector institution for Dutch cinema and the national museum for film.

⁴ <http://www.programma.eyefilm.nl/nieuws/in-memoriam-hoos-blotkamp> (last accessed: 31 August 2014).

Copyright Ownership

A detailed and exhaustive exposition of what copyright currently constitutes remains outside of the scope of this thesis, which in the context of the film archive focuses more upon its effect. Law professor David Bainbridge (2012) notes that the basic principle of copyright that defines all copyright laws is that it grants the *author* of a work the *exclusive* right of reproduction and the right to communicate that work to the public, with reproduction and communication including a range of actions, including a right of translation and adaptation as well as acts of publishing, distributing, exhibiting, and broadcasting. The period of copyright protection starts from the moment the work is created, but does not last forever: its *term* expires. When a copyright has expired, the work is said to be in the public domain, and it can be freely used without restrictions. Throughout the European Union and in the USA the *length* of a copyright term has currently been fixed to the author's life plus seventy years. After the author's death, the rights transfer to his/her heirs. A copyright owner may also permanently *assign* their right to another person. A temporary permit to execute copyright-restricted activities within certain limits is called a *licence*. Licensing is the most common form of copyright exploitation. The author's so-called *moral rights*, such as the right to attribution and the right to integrity of the work, *cannot* be assigned (although they sometimes can be waived by contract): they are intrinsically interwoven with the author's life and cease to exist after the death of the author (Bently and Sherman, 2008).

Film archives own, or hold on deposit, many physical works of film, whereas the copyright owner to these might be someone quite different. Commercial archives tend to be the copyright owners to most of their holdings whereas generally, public archives own little copyright. Film material is fragile material that needs special

treatment for long-term preservation and film archives often have to duplicate original elements in order to ensure the long-term survival of their contents. Duplicating works and communicating them to the public are considered to be copyright restricted activities and without the consent of the rights holder considered to be prohibited. Under Dutch law, archives, libraries and museums are allowed to reproduce work for preservation purposes with the aim of protecting the work from decay, or if the technology with which the work is made accessible becomes obsolete, to keep the work consultable (Spoor, Verkade and Visser, 2005), but this is not necessarily true for other countries' archives. Sometimes the preservation activities carried out behind the scenes are already constrained by copyright restrictions.

Matthew David and Debora Halbert write in the introduction to their edited volume *The SAGE Handbook of Intellectual Property* (2014, p. xxxvi) that “a balance between ownership and exchange of ideas has always been the key to debates over intellectual property”. A recent technological innovation that has and will continue to have far-reaching implications for the way in which film works can be exploited (and therefore, how they can be protected) is *digitisation* and “it has only been with ... the challenge of digital reproduction that intellectual property has come to be a household term” (David and Halbert, 2014, p. xlix). In the last decade, the particular discussions about digitisation and cultural heritage institutions' collections have quickly gathered steam. It has become clear that new ways of accessing and using collections have been and are being created by new technologies and new ways of distributing. A particular current issue is how digitisation provokes a review of archival holdings. Recently, the implications of digitisation for the understanding of film history have been addressed in a paper entitled *The Gap between 1 and 0* (2007), in which film scholar and director of the UCLA Film & Television Archive Jan-Christopher Horak

addresses omissions in history in this “digital age, seemingly guaranteeing instant accessibility” (p. 29). This project’s primary site of scrutiny is the film archive, and more specifically the practice of providing archival access, as the premise is that the impact of copyright is most palpable in this area, the practice in which the archive intersects with the outside world. Only in access to films, frameworks of meaning are constructed and filmic material will be able to reach its, as film scholar Janna Jones (2012, p. 109) emphasises, “potential for history making”. Issues of digitisation and copyright are intertwined as the widely held expectations about what film is are based not only on what evidence is kept in the archives but more importantly how much of that evidence is accessible. The works that are frequently made public are those works that are easiest to digitise: works, which aside from restoration issues have a secure legal provenance.

The existing literature addressing copyright in the context of film archives stems from two different fields: intellectual property law and film archival practice. In 1991, UNESCO produced the report *Legal Questions Facing Audiovisual Archives*, which was a result of the wish expressed by the UNESCO Consultation of Experts on the Development of Audiovisual Archives in 1984 to “initiate a study of copyright in relation to moving images to determine the changes necessary to permit moving image archives to function, and a parallel study of archival legislation to determine how archives can be exempted from copyright restrictions” (p. 3). The report concludes that there were indeed international conventions and recommendations that related to audiovisual material, but that they did not at all relate to audiovisual *archives*. The special position of audiovisual archives as keepers of the audiovisual heritage had been widely underdeveloped and no recommendations had been implemented into national copyright legislation. A recently edited publication entitled

Copyright and Cultural Heritage, Preservation and Access to Works in a Digital World (Derclaye, 2010) provides an overview in which exclusively legal experts discuss preserving and accessing cultural heritage in the light of diverse copyright issues in the context of such cultural sector institutions as archives, libraries, museums and galleries. Both fields can be seen to be disciplinary and do not address the implications of their own field for the other. One of the aims of this thesis is to raise awareness and to start building a bridge between these fairly discrete bodies of literature.

The works that seem to pose the most obvious and particular problems in the discussion around digitisation and subsequent access are the orphan works. The problems that public film archives face in preserving and trying to provide access to works are exacerbated in terms of the dormant potential of the archive in cases where the rights holders cannot be identified or located; permission for use cannot be sought and the distribution of the archival material is halted or significantly delayed (the topic of chapter three). This has serious repercussions for the archival practice and for the films' "potential for history making". The legal literature is descriptive of the orphan works problem, and is concerned with mapping out the problem, its underlying causes and potential legal solutions (USCO, 2006; van Gompel, 2007a; 2007b; Elferink and Ringnalda, 2008; van Gompel and Hugenholtz, 2010; JISC, 2011; Pallante, 2012a; 2012b). However, beyond the notion that legal restrictions render certain collections dormant, there is no mention of any effect the resultant unavailability of heritage materials might have on the writing or on the understanding of film history.

The archival practice is engaged in numerous research projects and initiatives, such as the EU project European Film Gateway (EFG). These kinds of research

projects come with the obligation of writing deliverables, and in the case of EFG it has led to such texts as *Report on Legal Frameworks in European Film Gateway (EFG) Consortium Member States* (2009) or *Final Guidelines on Copyright Clearance and IPR Management* (2010). Although both the legal and archival practice literature do much to understand the problems as some of them have laid out the current legislation in several EU member states, for instance, they do not deal with any implications of potential restrictions to archival access.

It is surprising that the field of film studies, and more specifically film history, has not produced more publications on the subject as legal restrictions influence so profoundly the essence of what a part of the field takes as its subjects and objects of study. Three film scholars who have recently addressed copyright, or legal restrictions in a general way, are Peter Decherney, Kristin Thompson and Lucas Hilderbrand. Peter Decherney shows in his *Hollywood's Copyright Wars* (2012) how the Hollywood studios and intellectual property laws seem to have shaped each other reciprocally. Lucas Hilderbrand in *Inherent Vice* (2009) analyses the specific case study of analogue VHS tape and its ties to bootlegging and preservation practices while raising issues of intellectual property rights. In an article in which she discusses with a film scholar and an archivist why a so-called celestial multiplex, in which every film that has survived can be downloaded for free at any time, Kristin Thompson (2007) identifies copyright issues as one of the main factors why such a celestial multiplex will not put in an appearance any time soon. None of the authors, however, address the specific historically contingent interrelationship between copyright ownership, the film archive and film history writing, which is the main topic of this thesis.

In this thesis, the particular filter of copyright ownership, and the resultant, as

Law professor Ronan Deazley (2006, p. 124) has termed it, “significant opportunity for interplay between the ownership of the physical object, ... and the ability to control the subsequent use and dissemination” of that object, will be used to indicate that in the context of a film archive copyright shapes availability and accessibility of archival film, as not all material is or can be (made) available for the purpose of film historical activities. Rather than simply viewing copyright in a negative way, by highlighting the constraining function it can be seen to exercise, in this thesis it will be the constraints as well as the resistance against those constraints that will be foregrounded in the analysis, which can be seen to be Foucauldian in nature.

According to Sara Mills (2003, p. 33) in her analysis of the theorist’s work, Foucault argues that “even at their most constraining, oppressive measures are in fact productive, giving rise to new forms of behaviour rather than simply closing down or censoring certain forms of behaviour”. In *The History of Sexuality* (1978, p. 95) Foucault states that “where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power”. In this thesis it will be the way in which resistance operates as a part of power in the context of the film archive that will be examined. On the one hand, the film archive is subjected to copyright law, against the constraints of which it can be seen to resist. On the other hand, the archive makes productive use of copyright in its involvement in that interplay between the ownership of the physical objects and the ability to control the subsequent use and dissemination of those objects, which in turn leads to productive outcomes. Some aspects of this power – resistance – productivity relation, such as human agency, as archivists cannot simply be seen as the recipients of power but as the ‘vehicles of power’, will be further unpacked in the context of later chapters, particularly chapter four, which focuses on the public domain film.

Need for Re-Categorisation and Research Methodology

The research in the context of this thesis identified the need to re-categorise archival holdings based on their copyright ownership status: it arose to be ‘freed’ from other arbitrary, but more established, categories such as country, director, genre or film carrier in order to analyse the difference in how access to the materials is provided. It has resulted in a cross-section with four quadrants, each representing a particular copyright ownership situation, a legal collection, plotted against its potential availability. Although the cross-section has been modelled on EYE initially, it can also be seen to represent the most common situations for other public national archives, such as the British Film Institute or even the Centre National du Cinéma et de l’Image Animée (CNC), the mandatory film depository for legal deposit in France, and therefore can be seen as case-independent.

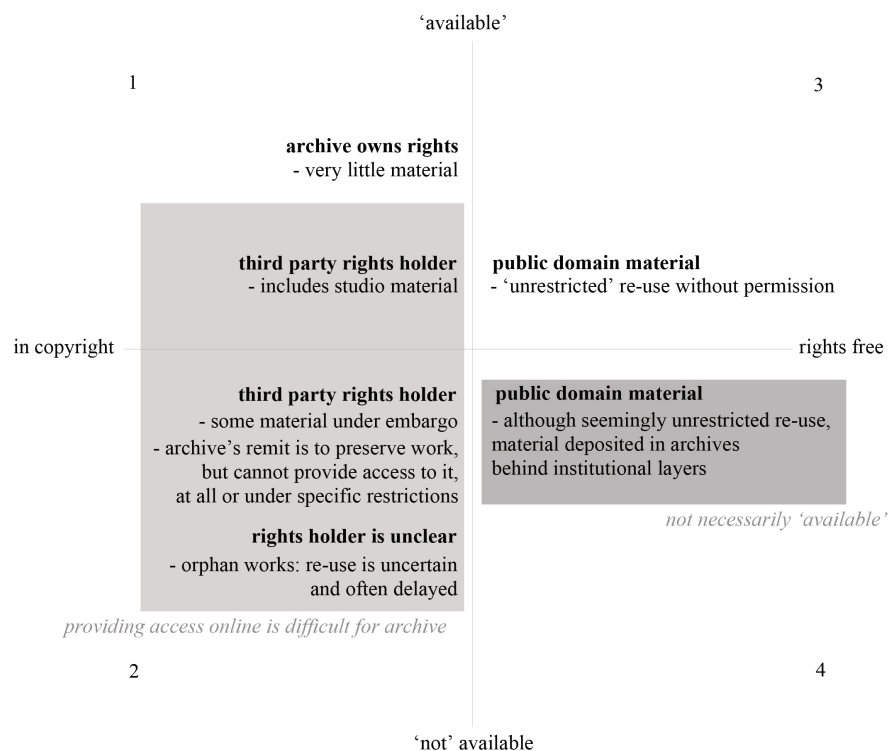


Illustration 1. Legal cross-section of national film archive

Quadrant one represents the films under copyright, which are more or less ‘available’. Availability in the context of this cross-section should be understood as the ‘potential’ or ‘latent’ accessibility of the material. Material might be ‘available’ for researchers for an on-site consultation, for instance, but that does not mean that the material is ‘available’ for further public dissemination. Here, ‘availability’ should be understood as the latter. The quadrant can be split up in two discrete parts: those films of which the archive owns the rights and those of which an external, *known*, party owns the rights. The first part is fairly small, and can consist of films by an individual filmmaker who has (partially) donated his/her holdings, and rights, to the archive. The second part includes, in the case of EYE, for instance, such films as studio material deposited by distributors. In the light of the analysis later in this thesis, this part also represents the material that might legally and financially be prohibitive to found footage filmmakers, and for which filmmakers outside of the archival context have found alternative ways of accessing.

The second quadrant represents the films under copyright but which are not readily available. This quadrant also consists of two sections: one with material with an external rights holder, which might be under embargo (chapter two will highlight an example) and the other section comprises the films of which it is unknown who or where the rights holder is, the so-called orphan works (the subject of chapter three).

Quadrants three and four can be considered together as they both address works in the public domain. As the cross-section was made on the basis of copyright ownership and plotted against the material’s potential availability, one could assume that the public domain works would pose no problems as they can be seen to be legally ‘available’. It turns out, however, that although they can seemingly be re-used unrestrictedly without the permission of a copyright owner, archives do not

necessarily have the possibility to provide access to these materials. It is in this category that exclusive ownership of the source materials plays a crucial role. Public domain works will be the subject of chapter four.

The quadrants will each be addressed systematically in the following chapters and will be illustrated with examples from the collection of EYE. An interesting cascading effect will be able to be observed as the copyrighted works from quadrant one shed their light on the issues of the orphan works of quadrant two, which in turn will expose the public domain works of quadrant three and four as problematic in their own right. This will lead to the conclusion that placing the orphan works problem exclusively in a legal paradigm needs rethinking.

Once all quadrants have been addressed, a clearer picture of the specific interrelation between copyright ownership, resultant access and the film archive will underpin the analysis of the artistic intervention of re-using archival film, as an example of ‘doing’ film history with all sorts of archival films themselves. More specifically, the collection of film fragments BITS & PIECES will be used to accentuate how the consistent application of copyright ownership has both facilitated and restricted, as well as resisted the use of archival material within a film institutional framework.

A cross-section based on copyright ownership has turned out to be a useful tool for scrutinising discrete parts of the collections as it provides a way of thinking about films irrespective of what other, more established, archival categories they belong to. It allows for a so-called meta-perspective and an examination of what kinds of problems occur in which kinds of groups of films. Also, the re-categorisation and its resultant quadrants, as outlined in chapters two, three and four, will unravel some of the contemporary economics of archival access, such as exclusive ownership of

source materials, a financial responsibility for the continued preservation of works as well as the human agency behind some of the decision making involved.

The specific film examples in the context of EYE as addressed in the individual chapters representing the discrete quadrants initially followed organically from the re-categorisation. The question of how copyright restrictions and / or possibilities play a role in the digital distribution of the film titles attempts to address a contemporary phenomenon within its real life context and has been researched while taken into consideration how that phenomenon was influenced by the context within which it was situated. Most of the contextual conditions, such as institution, country, technological possibilities and legal framework were identical for the discrete film examples and remained constant throughout the small time period that was scrutinised. As in most cases of qualitative studies, data collection and analysis occurred concurrently, and as the film examples grew more substantially into case studies, the quadrants and the case studies started to reinforce each other. Thought to be representative of a situation that extended beyond the Netherlands and in order to prevent inductive reasoning, the case studies were tested against practices in other archives, such as the British Film Institute and the Academy Film Archive but also a company whose business model is based on the exploitation of public domain footage.

The project describes a phenomenon in context and relies on multiple sources of evidence: primary and secondary sources such as literature, documentation, archival records, the physical film artifacts and (retrospective) participant observation in the form of the author's in-depth local knowledge while serving as a staff member in the organisational setting of a national film archive. This variety of data sources was complemented with semi-structured interviews, which were chosen for their

flexibility and as the most effective method of obtaining primary source material that was unavailable elsewhere. As Stobo, Deazley and Anderson (2013, p. 6) have indicated: “Documented examples of archival rights clearance projects are scarce, and where studies exist, they have generally been conducted at large-scale level, and do not contain sufficient detail to enable in-depth analysis of the rights clearance process”. The interviews sometimes covered specific areas of for example, an artistic practice, but the questions were always brought back to the policies, practices and educated opinions of the respondents to their experience of copyright (practices). A set of questions was prepared but in most cases was not rigidly followed and the length of interviews allowed for follow-up of interesting and unexpected lines of enquiry raised by the subjects. Interviews were conducted with staff members of a variety of institutions involved in the case studies. For instance, in the case of *BEYOND THE ROCKS* (US Sam Wood, 1922) highlighted in Chapter four, representatives of the three parties involved in the digital re-release of the film were interviewed; the original producing studio Paramount, the non-profit archive where a print of the film was found after it had been considered lost for nearly 80 years as well as the company who ultimately released the film on DVD as this was a different entity than the distributing studio. Once completed, the interviews were transcribed to provide usable data and the transcriptions were used for a variety of reasons. At some occasions, quotes have made their way directly into the text of this thesis. In other occasions, they have led less visibly to a particular streamlining of the consulted literature and further shaping of the research questions underpinning the thesis.

The Film Historical Narrative

Film historical narratives are not only themselves fragmented, but are sometimes also constructed based on partial evidence. When film history is written based on archival source material the two kinds of fragmentation are interconnected but need to be seen as distinct.

In this thesis it will be understood *a priori* that there is no such concept as *the* film history, as often that concept or the idea of a ‘totality’ of film history is seen as an ideal, however unattainable (Bowser, 1975; De Kuyper, 1994; Christie, 2013). “The basic problems about ‘doing’ film history are the same as with any other form of history: what is the object of study, what counts as evidence and, finally, what is being explained?” (Elsaesser, 1986, p. 247). It is worth looking then at how film history is ‘done’ in practice, as film history, as any history, will always necessarily be partial, provisional and written from the present and will always require the intervention of a human interpreter (Manoff, 2004). In *Film Histories, An Introduction and Reader* (2007, p. x), film scholars Paul Grainge, Mark Jancovich and Sharon Monteith have explained it as follows:

Research is always about finding a focus. The attempt to capture and reproduce the richness and fullness of the historical past is not only impossible but seeks to mirror its object of study, rather than identify a purpose for studying it and studying what is relevant or irrelevant to that purpose. As a result, the intense conflicts over the relevance and irrelevance of specific details, or over what is significant, is not simply a conflict over absences or omissions but over the appropriate focus and purpose of historical research. (Grainge, Jancovich and Monteith, 2007, p. x)

Film scholar David Bordwell (1994, p. xxxiii) has termed the particular framing of the film historical enquiry the “research program and its questions”. The terms do not focus on a desire for completeness of history but rather on the critical framing that is necessary as expressed in the deliberate choices by the historian as an inevitable

selection from a wealth of material will have to take place.

Most writers exploring the concept of the archive share a notion of an archive as a repository and collection of artifacts (Manoff, 2004). As highlighted earlier in this introduction, the film archive can be seen as a repository of heterogeneous evidence and as a potential starting point of a certain kind of film history as they hold the actual products that such history can be based on. But rather than a set of things, a fixed entity that is unchanging, or as Foucault in *The Archaeology of Knowledge* (1972, p. 130) has termed it, the “library of all libraries”, the archive in the context of this thesis needs to be seen as a set of relations:

The archive is not that which, despite its immediate escape, safeguards the event of the statement, and preserves, for future memories, its status as an escapee; it is that which, at the very root of the statement-event, and in that which embodies it, defines at the outset *the system of its enunciability*. Nor is the archive that which collects the dust of statements that have become inert once more, and which may make possible the miracle of their resurrection; it is that which defines the mode of occurrence of the statement-thing; it is *the system of its functioning*. ... [I]t reveals the rules of a practice that enables statements both to survive and to undergo regular modification. It is *the general system of the formation and transformation of statements*. (Foucault, 1972, pp. 129–130)

Foucault argues that the archive has to be seen as a site of knowledge production realised specifically through a set of relations. Throughout this thesis, the term archive is meant to signify a networks of relations through which history can be shaped, including its relations with a variety of stakeholders such as archivists, rightsholders and users, but also the technical, legal, social and economical methods and structures it can be seen to be part of and that help determine what can be archived.⁵

⁵ What Derrida in his *Archive Fever* (1998) has termed *archivization*.

In this thesis the concepts ‘copyright’ and ‘film history’ are also not seen as fixed and stable absolute notions but should be seen as ‘doing’ copyright and ‘doing’ film history. Some of the latent potentials of these notions need to be actively realised: someone needs to take a decision to provide access, someone needs to take a decision to apply or disregard a certain legal rule; someone needs to take the decision to use particular sources and to frame the narrative in a certain way. They need to be seen as historically contingent cultural practices and as the result of a process of negotiation involving technological, social, economic and institutional factors. The selection of the main EYE-related case studies presented in chapters two, three, four and five has been based on their moment of public access: a period between 2002 and 2005 when the particular constellation of technological, social, economic and institutional factors impacting the film archive and copyright can be seen as relatively uniform. For the film archive digitisation was in a start up phase and was selective as opposed to later pressures to digitise ‘everything’ and in terms of the law, there was a specific copyright legislation operational at the time without any major changes.

In order for a film to construct frameworks of meaning and to realise its “potential for history making” as film scholar Janna Jones (2012, p. 9) has termed it, it needs to be available and publicly accessible. She goes on to state more precisely that the “teaching of film and the construction of its history depend upon a clear and available view of the filmic object; neither an inferior duplication nor a restored beauty unavailable for public viewing can entirely enhance the cultural understanding of film” (Jones, 2012, p. 97). The availability of the filmic object might be part of a specific historically contingent way of thinking about a particular construction of film history as for years some of that film history has been written on exactly those inferior duplications, such as VHS. This thesis agrees with the basic premise though, that in

order for a film to reach its potential for history making it needs to be available and publicly accessible.

Film professor and founder of the Orphan Film Symposium Dan Streible (2009, p. ix), emphasises that the visible part of the archive is only a partial picture, as for various (political, economic, curatorial, etc.) reasons “historians are not seeing most of the films that exist to be studied”. Film curator and film historian Paolo Cherchi Usai wrote in 2000 that “less than 5 percent of all the film titles preserved in the average film archive is seen by scholars ... much of the remaining 95 percent never leaves the shelves of the film vaults after preservation has been completed” (p. 69). The film archive is a testament to the fact that the records that survive into the present are always incomplete. It is impossible to collect and preserve everything that has been produced (nor should it be desirable) and a further fragmentation can be identified as in the context of the film archive it is impossible to provide access to everything that has been preserved. The perhaps misleading impression of completeness of the archive might recently have been exacerbated by developments in digitisation and a shift in focus to digital access. The correlated concept of the digital skew, with which is meant the disparity between analogue and digitised collections, and which is allegedly primarily caused by copyright gridlock (McCausland, 2009), will be discussed in chapter four, particularly in the context of public domain works.

Reasons for fragmentation can be seen to be, as stated earlier in this introduction, acquisition policies and the particular growth of collections, the timing and choices made in identification and further preservation activities. Copyright ownership, or rather, the process of realising the latent potential of copyright, can be seen as an important filter that shapes the availability of archival film, with

consequences for the material's potential for history making, and therefore colours the understanding of a larger film historical narrative.

By scrutinising where the specific intersection of copyright ownership and the film archive meets with the outside world - in access to archival film - it becomes most palpable that the visibility of important works of film that are arguably crucial to our understanding of the past are not only shaped by the filter of copyright ownership but also by the archive itself, as keeper of the material evidence. Based on the same body of work different stories can be told.

Both film history and the film archive deal with fragmentation, however, they are not the same kinds of fragmentation. The gaps in film history tend to get obscured in the narrative within which they are constructed, framed by the specific enquiry of the historian and written from the present. In turn, film history is not per definition told from the archive, but can be written based on archival sources. Film historians describe and analyse film history based on the films that film museums have collected, restored and provided access to over the course of the years (Lameris, 2007). The framework of the archive is one of the contingencies that determines the way the material can and will be used. Moving image archives, housing historical filmic evidence, and deciding to provide access or not to the material help shape the way in which film history is understood. Film history based on film archival sources consists of a complex net of interrelations and is intertwined with the underlying principle of copyright ownership. It is constructed not only by the legal system, which as a guiding and filtering mechanism underpins the archival institution, but also by the archive itself, as control of the evidentiary products further fragmentises the archival holdings. The consideration of public accessibility of the archival material plays an under-researched role and needs to be factored in. In this thesis, it will be

argued that in the contemporary context of a film archive, ‘doing’ film history must always be seen in the light of the fragmentation that takes place in the archive.

In its concern with the idea of the film archive as a storage place for films as sources for potential film history making, the periodisation of the thesis comprises roughly the last 25 years of film archiving as a time frame, which is characterised by a newfound understanding of films and archives as primary sources, the changing nature of filmic evidence and the indicated importance of films thought of as marginal before. The periodisation hinges on the FIAF Congress in Brighton, UK in 1978 as it is commonly seen as a landmark event that constituted a turning point in film historiography. The Congress, as part of a larger historical contextualisation of the ‘return’ to archival film as a primary source, will be the detailed focus of chapter one.

Structure of the Thesis

The contention of the thesis is that ‘doing’ film history in the context of the film archive should always be seen in light of a certain fragmentation of accessible material that takes place in the film archive. Following this Introduction, in which some of the premises of the specific interrelation between the discrete components of the research project are introduced, every chapter will propose different notions and roles of copyright, the film archive and film history/historiography that can be construed. All three are historically contingent concepts as is their interdependent relationship. Every chapter will conclude with a reflection on a particular constellation of that interdependent relationship, and will be considered in relation to particular steps in the perceived fragmentation of accessible material. In the conclusion, all of the particular steps will be considered collectively as the ‘full fragmentation’, which is meant to signify the process in which an ever increasingly narrowing hierarchy of extant, potential available and publicly accessible material takes place.

Chapter one is the broadest in scope and comprises two aims. Firstly, to provide a historical contextualisation, in the form of two examples of revisions of film histor(y)(ies) based on a ‘return’ to the archival film as a primary source in order to challenge previously held ideas of what film is. Secondly, to provide a basis for the assumption in later chapters that availability and accessibility of archival film material continues to be integral to a contemporary construction of a certain film history. The first section of chapter one will focus on the FIAF Congress in Brighton, UK in 1978, a landmark event in the changing positioning of filmic evidence. The second section will address the case of a specific film archive (Nederlands Filmmuseum), which in the late 1980s and early 1990s centred on (the aesthetics of) its own archival

collection, instead of the established film canon. In both cases, it was ‘forgotten’ material, often devoid of a legal status, that was not seen as marginal anymore. The new approach of the resulting revisionist film history, in which the archival films themselves were considered, seen and examined, changed the concept of the film archive. It was not seen as *terra incognita*, uncharted territory, anymore but as a potential primary source for history writing. The particular part of the fragmentation that the chapter addresses is that extant archival film material was taken into consideration in a revisionist spirit and that it was recognised that the surviving extant record was fragmented.

Chapters two, three and four will address a further fragmentation in detail, based on a re-categorisation of the film archive according to the copyright ownership status of its film holdings, as well as access to the works in the resultant quadrants.

Chapter two outlines the issue of ‘the copyrighted film’ and will include such topics as the colourisation debate of the 1980s and the paper print collection in the Library of Congress, which highlights that a method of complying with a technicality in the copyright law became an inadvertent means for recovering film history. Prime example in the chapter will be a film that was under embargo, *ALS TWEE DRUPPELS WATER* (*THE SPITTING IMAGE*, NL 1963, Fons Rademakers) in a public sector film archive. Despite the archive’s specific remit of preservation, restoration and dissemination, it took nearly four decades for the film to return to the screen. It is currently regarded as one of the most important post-WWII Dutch feature films. An inhibited visibility of important works of film that are arguably crucial to an understanding of the history of film is the result if a film archive cannot provide access to its holdings. The film archive can be seen as a ‘Swiss bank’, with an obligation to maintain confidentiality about its holdings in the interests of its ‘account

holders'. Copyright fulfils a protective function for rights holders while it simultaneously plays a more constraining and limiting role in relation to film history. The particular part of the fragmentation to consider in the context of this chapter is that extant does not equal available. Availability is a concept worth unravelling, as it is part of a fragmentising effect that includes considerations of institutional factors, such as restoration practices, but also copyright restrictions.

Chapter three will examine the phenomenon of the orphan film; a film without identified or located copyright owner, which raises particular difficulties in the context of digitisation and archival access debates. It will use *DE OVERVAL* (*THE SILENT RAID*, NL 1962, Paul Rotha) as an illustrative example to show how untraceable copyright owners, and the consequent inability to clear the rights in such a work, can halt or significantly delay the distribution of archival film. Copyright then functions restrictively for film history, but in contrast to the examples in the previous chapter it does not protect right owners in case they might not be aware of their owning rights. The legally uncertain category of orphan films will characterise the film archive as a 'temporary placeholder', as a safety net and a warehouse for (absent) rights holders. When films can legally not be re-used, sometimes the archive decides to go ahead with the re-use anyway, based on a risk analysis. In its resistance to some of the applications of copyright law, the institution that controls the evidentiary products can be seen to actively shape access to its film archival holdings. The particular part of the fragmentation that can be discerned in this chapter is that extant material, despite its legal unavailability, *may* be made available based on the agency of the film archive and its staff.

Chapter four will be dedicated to public domain films: films that should not pose any problems in mass digitisation projects, as they are films that should be free

from legal restrictions and can be used without the need for permission for use from the copyright owner. By comparing the varying practices in which both for-profit and non-profit archives provide access to their public domain works, the chapter points out that a refocusing on the distinction between intellectual and material ownership is needed. A focus on material ownership will unravel some of the contemporary economics of archival access, such as exclusive ownership of source material and human agency. *BEYOND THE ROCKS* (US 1922, Sam Wood) will be used to illustrate that archival access is not only controlled by those who own the rights, but also by those who own the physical assets. Even when there is a lack of legal restrictions, the archive itself plays a role in the shaping of access practices as well as a particular potential for film history writing in deciding to make a film publicly accessible. The film archive can be seen as an active site of agency, power and resistance, as a ‘vehicle of power’. What access to orphan films in the previous chapter and to public domain films in this chapter helps to indicate is that one of the contingent elements of film history writing is the institution that controls the filmic products. The particular part of the fragmentation that is highlighted in this chapter is that even when a part of the extant record is legally available, it is not necessarily publicly accessible; it has to actively be made available.

In order to address some of the distinctive access policies examined in earlier chapters both in detail as well as collectively, **chapter five** will examine the particular artistic intervention of re-using archival film, both within and outside of the context of the film archival institution. It can be seen as a contemporary practice of a ‘return’ to the filmic source, as ‘doing’ film history with the films themselves. Just as the historical examples, it can be seen as resistant and revisionist in nature as it challenges film history, the way that history has been written (Thouvenel, 2008) as well as the

institutional role of the film archive in constructing that film history. The archive can be seen as ‘a birthplace’, where the archival film material becomes a raw ingredient for new products. The particular part of the fragmentation the chapter considers is that multiple levels of fragmentation intersect in the artistic practice, not only on the level of the actual film as the re-use of unidentified film fragments is considered, but also on the level of fragmented availability of source material. By highlighting the potential of the archive, found footage filmmaking brings attention to the partial picture of the archive that is visible.

The last chapter, the **Conclusion**, will reconsider the different notions of copyright, film history writing and the film archive highlighted in the individual chapters as well as their interrelatedness. They will be seen not only as multifaceted but also as cumulative. The specific filter of copyright can be seen quite literally as cumulative as over the years elements have been added to the existing law until it has formed a sort of *patchwork quilt* (Alberdingk Thijm, 2008). Film history writing can be seen as multifaceted and cumulative as in the conclusion the distinctive aspects of fragmentation identified in the discrete chapters will be considered collectively. The films that are extant are not necessarily available and the ones that are available are not necessarily publicly accessible. ‘Doing’ film history in the context of the film archive should then always be seen in light of a certain fragmentation of accessible material that takes place in the film archive. In turn, the film archive can be seen as multifaceted and cumulative because it can be seen to be all of the notions highlighted in the discrete chapters. It can be terra incognita, a conglomerate of broom closets, a Swiss bank, a temporary placeholder, a vehicle of power and a birthplace. In the specific context of this thesis, it needs to be seen as an intersection of multiple layers of fragmentation and as such as a mediator between copyright and film

historiography. All of these notions work together to provide access to the material and thereby giving it potential for 'history making'.

1 TERRA INCOGNITA

Introduction

This first chapter will present a few historical examples contextualising the importance of availability and accessibility of archival film for the construction and potential re-vision of film history writing. The first section of chapter one will focus on the FIAF Congress in Brighton, UK in 1978, a landmark event in the changing positioning of filmic evidence. The second section will address the case of a specific film archive (Nederlands Filmmuseum), which in the late 1980s and early 1990s centred on its own archival collection, instead of the established film canon. In both cases, it was ‘forgotten’ material, often devoid of a legal status, that was not seen as marginal anymore. The new approach of the resulting revisionist film history, in which the archival films themselves were considered, seen and examined, changed the concept of the film archive. It was not seen as *terra incognita*, uncharted territory, anymore but as a potential primary source for history writing.

1.1 The 1978 Brighton, UK FIAF Congress

This thesis is concerned with the idea of the film archive as a storage place for various potential ideas of film history and as a potential breeding ground for expectations about what film is and, in accessing them, archival films as sources for film history making. The archive as a storage place for filmic sources and its role in film historiography has changed over the last few decades. One event during the late 1970s is ascribed a major role in the turning point of film historiography: the International Federation of Film Archives (FIAF) Congress in Brighton, UK in 1978.¹ The Brighton congress is seen as the historical turning point, where secondary and anecdotal forms of history were displaced with “primary documentation, archival research and other historiographical tools of evidence and verification” (Klinger, in Kuhn and Stacey, 1998, p. 5) and both by the archival and the academic film community it is seen to have led to what is currently called New Film History.

The gathering brought a group of archivists and film scholars together who, over the course of several days, watched hundreds of fiction films in chronological order from the period 1900-1906, a then little-known period of film history. All the films screened at the Congress were firmly in the public domain by the time of the Congress so they could be screened without permission from a rights holder. Not only did the screenings and subsequent scholarship lead to a re-evaluation and revision of

¹ However, the Brighton Congress as the breaking point between traditional historiography and New Film History can also be seen as having been mythologised (Fossati, 2009); it has even jokingly been referred to as the “Woodstock of film archiving”. (The joke was by Jan Holmberg, director of the Ingmar Bergman Foundation. Thank you to Christian Gosvig Olesen for the remark.) Recently, some scholars have started to voice their critique of the role that has been ascribed to the Brighton congress. One of them is film scholar Philippe Gauthier, who proposes in his 2011 article ‘L’histoire amateur et l’histoire universitaire: paradigmes de l’historiographie du cinéma’, that there have been other events that hold an importance for film historiography. In line of that thought he proposes to (re) divide the decades of the previous century into a paradigm of “amateur film history” until the 1970s, when historical discourses were intended for the general public and for the last few decades a paradigm of “scholarly film history”, whose historical discourse were almost always intended for scholarly film historians.

that period of film history, but arguably more important in the light of this thesis' argument, the consequent new approach to history changed the concept of the film archive as a repository of filmic evidence.

The project was initiated by David Francis, curator of the National Film Archive in London, the current British Film Institute, who

assembled nearly 600 films produced between 1900 and 1906 to show to a group of experts at ... the Symposium "Cinema: 1900-1906" which [followed] the Congress. The screening sessions were in the nature of a genuine premiere in the history of cinema. Never before had it been possible to see such a large number of films of that period in such a short time (5 days) and in one place; the films came in fact from seventeen cinematheques from all parts of the world. (Gaudreault, 1982, p. 9)

The films were pre-selected by a group of film historians in several FIAF archives, which had previously ignored the material and where the plethora of material had been forgotten. As former curator of the Museum of Modern Art and participant in the Congress Eileen Bowser (1979, p. 512) recalls, the historians dealt with what was left only: "there were many hundreds (maybe thousands) of films produced that [did] not survive, particularly those which were not copyrighted". Preliminary screenings were held both in the US and in Europe and for sheer quantity an unpreventable selection had to take place. A smaller, arguably selective, group of films were then screened integrally and chronologically at the Congress. The films were lent by several large archival institutions: "the International Museum of Photography at George Eastman House and the Department of Film of the Museum of Modern Art, but by far the largest number were supplied by the Motion Picture Section of the Library of Congress, from the Paper Print Collection of films submitted for copyright" (Bowser, 1979, p. 511). According to Bowser, it was "the first time that an international team of film historians undertook the study of a little-known period of film history as a

collaborative project” (1979, p. 509). Trying to see the films “freshly, and not from the sole point of view of what happened after 1906” (Bowser, 1979, p. 513), the screenings at the Congress and subsequent scholarship have led to a re-evaluation and revision of that period of film history. What was considered part of a primitive period before went from an almost completely underexposed corpus to one of the main research corpuses in the emerging academic film studies landscape (Gartenberg, 1984).

The resultant New Film History questioned several aspects of the preceding traditional historiography. The specific ones that will be elaborated here are teleology, a call for use of primary sources, both filmic and non-filmic, and a call for more intensive collaboration with archives. One of the aspects the New Film Historians questioned was the way in which the history was told up until then. They criticised the particular chronology and teleology they claimed was part of the traditional historiographic practice, as it took as its main topic the “history of film as a progressive development from simpler to more complex forms, treated according to that biological analogy of birth / childhood / maturity ...” (Bordwell, 1997, p. 9). In an orderly and linear evolution, it was assumed that individual filmmakers one after the other were responsible for film expanding into an increasingly nuanced art form and the resultant film historiography was a description of their masterpieces and the creative movements the directors were associated with. The New Film Historians, according to film scholar Tom Gunning (Horak, Lacasse and Cherchi Usai, 1991, p. 282), were interested in looking at film “from its own point of view, not simply as part of an evolutionary scheme”, which led on one hand to a revision of material that was deemed to be known and on the other to an exploration of the film archives in

search of uncharted material. It was the recovery and analysis of films themselves as physical evidence that became the centre of a particular practice of film history.

The New Film Historians also questioned the sources and the use of those sources their predecessors based their histories on. What characterises the New Film History perhaps most is the call for a return to archival primary sources, both filmic and non-filmic, as will become clear in the remainder of this section. One of the great difficulties up to the late 1970s was the lack of material to view. Film scholar David Bordwell (2013, p. 68) recently stated that partly due to the nature of the material, “[f]or about eighty years, the study of film history was dominated by an economy of scarcity”. Film history was often recorded and handed down from recollection: “Georges Sadoul, Jean Mitry, and other postwar historians ... wrote their vast tomes on the basis of catalogues, clippings, and memories, not intensive or extensive viewing” (Bordwell, 2013, p. 73).

There are several key points of interest to the call for primary research within the context of this thesis. One way in which the call for primary research expressed itself was the return to the filmic sources themselves. Having recently been made available, it was archival material that was central to the 1978 FIAF Brighton Congress, according to film scholar Thomas Elsaesser (1986), one of the two types of pressure that have produced the New Film History:

a polemical dissatisfaction with the surveys and the overviews, the tales of pioneers and adventurers that for too long passed as film histories; and sober arguments among professionals now that, thanks to preservation and restoration projects by the world’s archives, much more material has become available, for instance on the early silent period. (Elsaesser, 1986, p. 246)

In traditional film historiography the writing of film history had often been a reconstruction without the evidence of the films themselves. In a transcript of a

roundtable discussion ten years after the Brighton Congress, film scholar Tom

Gunning highlights the importance of the Congress in that return:

The exciting thing for me ... was the possibility of really seeing the films, for a period that was largely legendary. It was covered in almost every basic history, but often these histories, particularly the ones available in English, were several decades old. ... A very important thing I think came out of this, which was the importance of looking at the films themselves; that this was equally important to working out production histories and social histories. To actually look at the films themselves and to understand how they were operating became in many ways the most crucial focus of the new work. ... Now, since Brighton ... looking at film ... has maintained its importance. (Horak, Lacasse and Cherchi Usai, 1991, p. 282)

A characteristic of New Film History is also, as Chapman, Glancy and Harper (2007, p. 7) state, the “extent to which it has expanded the range of primary sources available to the researcher”. Expanding the range of filmic sources did not necessarily aim to replace the existing canon, as the emphasis appeared to be on the re-evaluation of the existing histories, as articulated by Jan-Christopher Horak in the same roundtable discussion:

When I think back on Brighton it seems to me that the experience for me was most important just in terms of my view of film history. Having previously been to graduate school, where even though there was a concentration on film and film history, you really only saw the canon of film history, which meant you got to see, at best, a few Meliès, a Lumière or two, *THE GREAT TRAIN ROBBERY*, maybe *LIFE OF AN AMERICAN FIREMAN* (the old version), and that was about it. And here for the first time you got not a horizontal view into film history, but really first vertical and then horizontal in a way that has changed my thinking completely on the history of cinema. It’s had an enormous impact, because for me the term primitive cinema is no longer a part of my vocabulary since Brighton. (Horak, Lacasse and Cherchi Usai, 1991, p. 283)

Additionally, by indicating the importance of films thought of as insignificant before, the New Film History also attempted to identify historical gaps, by exploring the uncharted territory of the film archive and potentially discovering archival rarities, as Horak elucidates:

... it made me realise that if it’s true for this early period, it was probably true

for every period of film history. You could learn from every kind of film, whether it was the worst trash, or a film that was considered high art, because here we were looking at a period that, according to the classic historians, was in fact not worth considering at all, and we were finding all these gems. And I think that just that change in the attitude towards film history, was a very important experience. (Horak, Lacasse and Cherchi Usai, 1991, p. 283)

Another way in which the call for primary research in the revisionist film history expressed itself was a focus on a different kind of sources; previously unused non-filmic sources, other primary documents that might be able to shed light on writing the history of film, such as court papers or patent registration documents. As recently as 1975, film history was considered to be the history of films and written as if films had no audiences or were seen by everyone in the same way (Kuhn and Stacey, 1998). In his landmark essay 'Writing the History of the American Film Industry: Warner Bros and Sound' (1976) from just before the Brighton Congress, Gomery stated that "we must not simply trust the old bibliographies or faulty recollections, but go out and seek the evidence wherever it may be" (Gomery, 1985 [1976]). He elaborates: "We must ... begin to search out new sources of primary data ... to challenge the usual conclusion, as well as the terms in which that explanation is written" (p. 119). The New Film Historians were interested in telling 'other' kinds of film (and cinema) histories than what Allen and Gomery called the "masterpiece tradition" (1985, p. 71), such as the history of film technology, or the history of film's relations to society or culture. Sometimes that meant looking for evidence outside of the films themselves. Film scholar Thomas Elsaesser (1986, p. 248) has said of this New Film History's "apparent indifference to 'actual films'": "To do film history today, one has to become an economic historian, a legal expert, a sociologist, an architectural historian, know about censorship and fiscal policy, read trade papers and fan magazines". The focus on non-filmic sources, has led to, as film scholar Wanda Strauven (2013, p. 5) has recently expressed it, "a new discipline ... : *cinema history*,

that is, the history of cinema as institution, as exhibition practice, as social space (as opposed to *film history*, which is, generally speaking, a history of masters and masterpieces)”).

A last point in which the New Film Historians, based on their newfound interest for archival sources, differed from their predecessors was collaboration with the film archivists and the archives. Former Museum of Modern Art film curator John Gartenberg has argued:

... the scholars’ awareness about materials held [was limited]. On their part, researchers have often relied on their memories and secondary sources, including other written film histories, rather than digging into primary resource materials in the archives. ... Scholars have often viewed archivists as unnecessarily secretive about their holdings. Conversely, archivists have viewed scholars as largely unaware of the workings of a film archive and of the delicate role the archivists play as mediators between the owners of the films ... and the users of the product. This kind of collaboration between film archives and universities, and archivists and film scholars is significant not only for the recent Brighton publication, but also in the model it established for future interactions on similar such projects involving intense study of neglected areas of film history. (Gartenberg, 1984, pp. 6–13)

The Orphan Film Symposium, a bi-annual gathering of film scholars and archivists to study “all manner of films outside the commercial mainstream”², about which more in chapter three, can be seen as a contemporary example of such an archival and academic collaboration with a revisionist spirit.

² <http://www.nyu.edu/orphanfilm/> (last accessed: 5 September 2014).

1.2 A “Conglomerate of Broom Closets”

The second historical example of a revision of film history based on a ‘return’ to the archival film evidence is the case of a specific film archive. In the late 1980s, early 1990s, the Nederlands Filmmuseum started centring on (the aesthetics of) its own archival collection, instead of the established canon. By doing so it helped establish a new film canon and created film historical resonance for its own holdings.

Current senior curator of EYE Mark-Paul Meyer reflects on some of the archival film collection beginnings:

Just as many other film museums, the Filmmuseum in Amsterdam was started up shortly after World War II by enthusiastic cinephiles who were interested in collecting films to ensure that they would not be lost. While the Filmmuseum’s archive expanded over the following decennia through contributions from collectors, the largest part of the collection was donated by distributors, filmmakers and producers. Due to this, the archive was a reflection of the film climate in the Netherlands, and by definition, it was characterized by both chance and lacunae. (Meyer, 2012, p. 146)

In the first forty years of its existence, the Nederlands Filmmuseum had predominantly concentrated on collecting. According to former deputy director and filmmaker Peter Delpeut it was far from a clear and well-organised institution: the collecting had been done on a small budget, and what had been collected had “piled up in the basement into a cluttered chaos” (Delpeut, 1998, p. 2). In her 1996 publication *Huis van illusies* (House of Illusions), Annemieke Hendriks explains in detail the history of the pavilion in the Amsterdam *Vondelpark* where the Nederlands Filmmuseum was housed for several decades. She quotes the late director of the Nederlands Filmmuseum Hoos Blotkamp who in 1990 termed that cluttered chaos a “conglomerate of broom closets” (1996, p. 109). According to Hendriks, the museum was “awoken by a kiss” (1996, p. 109) under Blotkamp’s leadership, who had

previously been a top official at the Ministry of Welfare, Public Health and Culture³ where she had led the sections of visual arts and architecture. Blotkamp became the Filmmuseum's director in late 1987 and in 1988, she appointed film scholar and filmmaker Eric de Kuyper as a first deputy director, who became responsible for the enormous growth in the number of screenings and only a few years later they had secured a large grant⁴ to decrease the backlog in nitrate preservation (Hendriks, 1996).

According to Delpeut (1998, p. 2), Blotkamp's pragmatic attitude could be described as "start at the bottom right and end at the top left", with which was meant that in a very post-Brighton spirit⁵, everything was taken out of the archive and looked at with a fresh view. Seeing a film before reaching a preservation decision was not standard practice: at foreign institutions, such as the Cinémathèque française, preservation decisions were often made by letting external committees consult lists of films (Delpeut, 2012). As De Kuyper (1994, p. 102) has commented, this led to the programming activities of archives to resemble each other into an "international style" and he criticised how this approach could be seen as different archives' "common approach to the history of film" as opposed to letting their programmes "reflect the collections" or "reflect on film history". The Filmmuseum took a different approach: Blotkamp looked for staff members who made a decision about preserving a film after having seen the film, based on their own taste and personal insight, whereby

³ In Dutch: Ministerie van Welvaart, Volksgezondheid en Cultuur.

⁴ In two stages, 13.000.000 Guilders (approximately 6 million EUR) became available. This funding was colloquially known as "the gold ship" (Hendriks, 1996, p. 109).

⁵ Jan de Vaal, director of the Nederlands Filmmuseum before Hoos Blotkamp had been the treasurer of FIAF and participated in the Brighton Congress (Holman, 1982, see list participants Vol. 1, p. 365). The Filmmuseum did not, however, participate in the Congress with any film prints (Gaudreault, 1982; see list Vol. 2, p. 18).

uniqueness in choice was encouraged (Delpeut, 1998). At the Filmmuseum, the film prints themselves became a point of departure (Hertogs and De Klerk, 1994).

What is important in the context of this thesis is that chance and lacunae built up over the years combined with the practice of viewing the material resulted in two main findings: firstly, the collection little resembled collections of other archives as most of the material turned out to be unknown, “wonderful rubbish” (Meyer, in Olesen, 2013) and “scarcely traceable to the canon of cinema history” (Delpeut, 2012, p. 220); in a heterogeneous collection the marginal turned out to be the norm. Secondly, a lot of the material turned out to be incomplete, not only on the level of the collection but also on the level of the actual film title. De Kuyper felt very strongly about what he saw as a denial of the incompleteness of the archive when he addressed it in an article (1991 (a), p. 10) and spoke of “falsifying”, of “distorting film history” when film history writing does not take the lacunae into consideration.

It was the combination of three factors that became the fundamental building blocks of a new policy that put the own collection centre stage: (1) the specific composition of the collection, a collection of ‘use’, which on one hand reflected the actual Dutch film climate but on the other also contained a high number of non-canonical titles; (2) a particular historiographic position, which considered that film history necessarily presents an incomplete image and that several histories can be told; and (3) a specific attitude, that the discrepancy between the collection and the official film history needed to be addressed and that reflecting on film history was one of the archive’s tasks. Blotkamp was of the opinion that especially the curious and the neglected parts from film history had to be brought to the attention of the public as “[o]thers had set foot on the beaten paths of history sufficiently already” (Delpeut, 1998, p. 4). In the film archival practice of the Nederlands Filmmuseum, the shift

from ‘old’ to ‘new’ film history coincided with a new preservation policy, which seemed to value similar aspects: “This policy exhibited parallels with revisionism, [which] also wanted to centralise unknown films in the film historical discourse” (Lameris 2007, p. 45–46).

According to Mark-Paul Meyer, the Filmmuseum’s innovative presentation methods were based on the composition of the collection itself:

The reason to use an innovative approach with the collection was actually brought to the fore by the collection itself. To a large extent, the archive was only accessible in a limited way at the end of the 1980s. While the films were properly registered, much about the films was still a mystery; identification, technical quality, and the determination of the cinematographic importance left much to be desired, in fact, there was only one way to change the situation: to take everything out of the vault, film can by film can, and see what each contained. It turned out that there was much to discover and, in the process of going through everything, it became clear that what was in the film history books didn’t match with what the Filmmuseum had in its vaults. There were titles from well-known directors, of course, but by far the majority of what was discovered was completely unknown material – often masterful or exceptionally beautiful work that deserved a place in film history – of film history as the Filmmuseum would propagate it. (Meyer, 2012, p. 146)

The uniqueness in choice of the collection development, however, did not create a collection that was ready to be programmed. The many unknown films and fragments were in need of contextualisation. Current Sector Manager Collections at EYE Frank Roumen, who started his career at the Nederlands Filmmuseum in 1988, has commented:

We had this insight that we should move to what we have in the archive, what we own, and search ways and forms of presenting ... short, silent, unknown films. ... [W]e started to experiment with [the addition of] theatrical [aspects], live music, orchestra[s] and compilations. (Fernandez Escareño, 2009, p. 190)

The Filmmuseum has also organised numerous academic symposia to create context as well as reflection for their collection. It is particularly the International Amsterdam

Workshop)⁶ that can be seen as a heir to some of the thinking behind the Brighton Congress: workshops aimed at an international peer group of film scholars, film archivists, and relevant experts to watch and discuss under-researched materials and topics in both film historiography and film archiving. The film material discussed was, however, not presented chronologically or divided by country, but rather thematically and associatively (Hertogs en De Klerk, 1994; 1996).

Both De Kuyper and Delpeut have actively helped shape Dutch and international film archival practice in the late 1980s, early 1990s, but have also frequently reflected on their practical work through their scholarship. They have both addressed ways to approach the discrepancy between the ‘rubbish’ and academic history books on several occasions. Delpeut, for instance, has called for the archive as an ‘aesthetic repository’ and that aesthetic repository to be the source of the archive’s programming:

The films should firstly be the subject of pleasure and should only be secondarily the subject of identification (and all related rational activities). That state of affairs can provoke the film archive to approach film history ... more from an aesthetic standpoint than from a historical one. Films exist then as the bearer of an affective relationship, not merely as a historical fact. This also means that when screening the films from the archive they should firstly be presented as fun and entertaining facts, not as historical facts. Perhaps this would also provoke a different kind of choices, other selections in conservation schemes. (Delpeut, 1990, pp. 83–84)

The Filmmuseum has taken the focus on the aesthetic rather than the historic aspect of moving images to the extreme by even reanimating hidden, forgotten and fragmented film history and has put unknown material centre stage by preserving, presenting and

⁶ The five Workshops that have been organised so far: 1994 - ‘Nonfiction from the Teens’; 1995 - ‘Disorderly order’: Colours in Silent Film’; 1998 - ‘The eye of the Beholder: Exotic and Colonial Imaging’; 2004 - ‘Re-Assembling the Program: the Program as an Exhibition Format’; 2009 - ‘Advertising Films: the Images that Changed your Life’. Information provided by Nico de Klerk, former Researcher at EYE.

disseminating unidentified fragments. The BITS & PIECES collection at the Nederlands Filmmuseum, which was conceived of in the late 1980s, early 1990s⁷ is a “series of (generally) short unidentified fragments of film, preserved primarily on account of the aesthetic value of the images” (Hertogs and De Klerk, 1994, p. 9). By deciding to preserve and present the unidentified and neglected fragments, De Kuyper challenged the prevailing historiographic stance:

The reason why they are neglected is that they do not have, and can't be given, a label. They are not registered and cannot be in traditional film history. We don't have criteria to select them. ... The result is that a film, which cannot be labelled with the help of the notions mentioned, cannot acquire a historical identity. That means, literally, it does not exist for film history. (De Kuyper, 1994, pp. 104–105)

Peter Delpout expressed it similarly by arguing that the BITS & PIECES were images that were not “presented as a well reasoned and categorised history, but rather according to the principles that the archive thrusts upon its curious visitor: astonishment, disbelief and, as with anything that time has coloured with patina, nostalgia” (Delpout, 1997, p. 7-8). In the early 1990s, there was no such label as orphan works or the orphan works problem and such works were initially seen as devoid of a legal status. Currently, the unidentified fragments, as orphan works *par excellence* are at the centre of a legal debate. Orphan works will be the subject of chapter three. As part of a particular artistic intervention in which archival film is re-used or re-worked, film heritage can become a raw ingredient for new products. Film fragments, and more specifically, unidentified film fragments, including their re-use, will be the topic of chapter five.

⁷ The first reel, BITS & PIECES 1-11, dates from 1990. Information provided by Annike Kross (film restorer, EYE) in email on 24 November 2014. This means, however, that the clips were assembled over a long period of time before that.

Giovanna Fossati's 2009 publication *From Grain to Pixel*, which charts the changing preservation and restoration practices of a film archive in transition from an analogue to a digital era, and Bregt Lameris' 2007 PhD thesis about the interaction between film preservation practices and film historical discourses, are both works that centre on EYE and have helped to understand that in the context of the archival institution, historiography does not mean a mere succession of epistemic shifts. Within the context of the film archive, more than one, perhaps a build-up of multiple film historical attitudes can be observed and various film historical perspectives can be seen as stored in the materiality of the archive:

The various film historical perspectives have settled in the material reality of the archive collection and restoration copies, so they are still present in the film museum practice. Additionally, an accumulation of historical film positions has been observed in the film museum practice. Where in film historiography the traditional views more or less made room for revisionism, within the film archival practice they co-existed. Film museums showed both the famous canon as well as unknown material; the restorations reflected both archival versions, author's versions as [well as] previously shown versions, and film museums selected films for the collection that played a role in both film historical discourses. (Lameris, 2007, p. 155)

The Filmmuseum holds less canonical titles than other large national archives might do; '[f]ilms from the 1910s make up the largest part of the collection of the archive' (De Kuyper, 1994, p. 108). Partly because of its large quantity of marginal and non-canonical holdings, and by centralising its own collection in access and presentation activities, EYE has been able to be, or rather, has chosen to be responsive to historiographical shifts. Both the composition of the collection and a focus on the specific aesthetic qualities of the archival film material have led to the development of new archival policies. As such, the institution has been instrumental in film history writing based on what has been made available throughout the last few decades. As Giovanna Fossati writes about this period in *From Grain to Pixel*:

the focus shifted from the celebrated centerpieces of official film history to its margins. Examples of this are the compilations of film fragments, restored and presented in programs known as BITS & PIECES, the unprecedented attention given to non-fiction films from the 1910s and the restoration of silent films with their original added colors (i.e. tinting, toning, stenciling). (Fossati, 2009, p. 172)

While in film historiography, classical conceptions were replaced by revisionism (Lameris, 2007); in archival practices this shift did not appear to take place, at least not to the extent that one replaced the other. It is not only the kind and the amount of material in the archive, it is also the specific narrative that is chosen: just like the example of the Brighton Congress, it is the particular approach to (film) history that shapes the concept of the archive.

The archive can be seen to have an active role in shaping historical resonance for its own collection. Collecting, restoring and presenting all reflect “some ideology, however unconscious, associated with a certain historical taste” (De Kuyper, in Hertogs and De Klerk, 1996, p. 79). On the level of film restoration, for instance, attitudes about which elements should be reproduced change continuously and as Lameris (2007, p. 158) has argued, “archival film collections will therefore represent a multitude of film historical interpretations, [which] makes the collections a reflection of the way in which film historians got to see the films in the past”. On the level of providing access to archival holdings, more precise catalogue descriptions and transfers to video, for instance, have made films more easily accessible, which can promote research. The selection criteria applied by the institution can be seen to influence research corpora and can actively help develop a new film historical canon (Lameris, 2007). In turn, film history is also actively shaped, which, as any history, will always be a construction, written through the filters of partiality, provisionality and the present: “[t]he judgments any historian applies to the past can’t help but

reflect the present the historian inhabits. These will surely shift, as presents do”
(Gaddis, 2002, p. 125).

The production and the preservation of an archive is not only a surviving structure of past processes but also constructive in the processes that turn the current archive into a future surviving structure of the past, in other words, the archive is at once the result of a particular historical narrative as much as an instrument for constructing a new one.

1.3 Film Archival Fragmentation

Based on the premise that only in being accessible can the film reach its potential for history making, the contribution of the film archive to a particular film historical narrative is fragmented: the films that are extant are not necessarily available and the ones that are available are not necessarily publicly accessible. The contention of the thesis is that ‘doing’ film history in the context of the film archive should always be seen in consideration of a certain fragmentation of accessible material that takes place in the film archive.

Taking into account what has been discussed in this chapter, it might be worth restating that in the context of the film archive accessibility to sources is key, as

Thomas Elsaesser remarks:

... the Brighton meeting was itself symptomatic of a new urgency felt by film archives about the preservation and accessibility of materials from the early period. ... As so often in historiography, new criteria of pertinence necessarily affect the hypotheses historians forge, consciously or unconsciously, about the data in question. (Elsaesser, 1990, pp. 2–3)

In the context of the film archive this would mean that with exactly the same material multiple stories could be told, however, only in being accessible can the film reach the potential for such stories to be told. The availability and public accessibility of archival film material has remained topical since the historic examples from the first parts of this chapter. A recent particular issue and consequence of limited availability of source material is, what Sally McCausland (2009, p. 159) has termed, the “digital skew”, with which is meant the disparity between analogue and digitised collections. The skew, allegedly caused by copyright gridlock, will be discussed in a later chapter in more detail, specifically in the context of public domain works. As film scholar and film archivist Jan-Christopher Horak (2007) has expressed, only “a minute amount of

material in relation to the total holdings of public archives has been digitized. ... [T]he rest remains invisible to all but a handful of specialists” (Horak, 2007, p. 30; 40). For instance, in 1988 the National Film Registry was established (about which more in chapter two): up to 25 films are added annually based on their “cultural, historical or aesthetic significance [and] are earmarked for preservation by the Library of Congress. These films are not selected as the ‘best’ American films of all time, but rather as works of enduring importance to American culture”.⁸ In 2007, however, “[u]navailable to general audiences in any digital format [we]re 75 silent films, documentaries, avant-garde films, and independent films by ethnic minorities, which together constitute a whopping 82% of all Registry films that have not been digitized” (Horak, 2007, p. 39). These practices can be seen to have an immediate effect on how these sources can be used:

This limited access to our collective film history severely constricts the scope of what can be taught to students now that the majority of college faculty teach primarily from DVDs. Thus, the construction of film courses is increasingly limited to a canon according to the market logic of Blockbuster Video⁹. ... Given these restrictions, students are confronted with a fragmented, incomplete, and distorted view of film history, based on what commercial distributors deem to be viable in the market place rather than what scholarship has ascertained as important. (Horak, 2007, p. 39)

Only being able to draw from a limited range of sources has an obvious effect on teaching, particularly the teaching of film history. It also has obvious consequences for the construction of the history of these sources and the resultant historiography.

Janna Jones chronicles in her book *The Past is a Moving Image* (2012) the history of cinema and the moving image archive and how current preservation practices actively help shape cinematic heritage. She details certain ‘masterpiece’

⁸ <http://www.loc.gov/film/faq.html> (last accessed 6 September 2014).

⁹ Large US-based chain of video rental shops until 2014.

restoration practices and addresses what can be seen as a process of canonisation within the archival practice:

Archives do have a relatively small collection of archival gems that they rely upon to help commemorate and acknowledge the cinematic past, but they do not have the time or the money to construct identities and cinematic meanings for most of their material. ... Until an archive can construct frameworks of meaning, moving images are merely celluloid matter that requires care and maintenance. Cinematic abundance suggests potential for the writing of future histories, but most unidentified film cannot speak for itself. Filmic material cannot reach its potential for history making until its biography unfolds. ... It is often the case that the materials with an already stable identity receive the most attention and their biographies continue to grow. ... Films deemed important by the archive circulate more easily, helping to reify their cultural and historical meanings. Films that have not yet been considered for preservation tend to remain obscure and unseen. ... Current restoration discourse and practices literally assemble and help to shape cinematic history and reveal how the moving image archive influences the ways that a film history is understood. (Jones, 2012, pp. 112–137)

As film scholar Ian Christie observes, the process of canonisation is “self-reinforcing, since canonic works tend to be shown most often, to be selected for restoration by archives, and to be used in education” (2013, p. 42). Recently, film scholar David Bordwell (2013, p. 81) has suggested that the canon has “largely collapsed”: “there are no longer ‘minor’ films. Every movie is potentially an object of veneration for some audience, and an answer to some research question. ... the economy of scarcity has become an economy of glut”. New technologies have been and are being created to use and distribute collections in new ways, which perhaps leads to heightened expectations of accessing collections, which currently can be seen to be “universal, instant, online, and free” (Enticknap, 2007, p. 15), yet “[a]rchives harbor a great many uncelebrated films that can shed light on the history of cinema art. If you are asking certain questions, no film is uninteresting” (Bordwell, 2013, p. 68). In providing access to archival films, and arguably specifically to forgotten holdings, none of these

authors ascribe any of the archival access restrictions to copyright constraints and issues of ownership.

In this thesis, it will be copyright ownership, as well as exclusive ownership and human agency, which will be used in later chapters as important filters that shape the availability of archival film and therefore colour our understanding of a larger narrative.

In a film archive the source material is fragmentary, both on the level of the collection as well as on the level of the individual films. In ‘doing’ film history in the context of the film archive, there is also an archival fragmentation in the material’s availability and public accessibility to be discerned that needs to be factored in. Not only do not all sources survive; of all that is left, only a small part is available. Firstly there is the extant material, whatever sources survive from the past; through restoration practices, for instance, only a certain part of the extant material is potentially available, of which in turn only a certain part is publicly accessible, based on such concepts as copyright ownership, exclusive ownership of source material and human agency. The hierarchy appears to be inflected by contemporary technologies, such as digitisation, and by new modes of funding, which have challenged institutional practices. In this thesis, the main challenge of availability and accessibility of source materials for their potential history making is of a primary concern and will be set in that changing archival landscape.

Conclusions

This chapter has provided a historical contextualisation, in the form of two examples of revisions of film histor(y)(ies) based on a 'return' to the archival film as a primary source in order to challenge previously held ideas of what film is. It has also provided a basis for the assumption in later chapters that availability and accessibility of archival film material continues to be integral to a contemporary construction of film history writing. The first section of the chapter has focused on the FIAF Congress in Brighton, UK in 1978, a landmark event in the changing positioning of filmic evidence. 'Re-presenting' the filmic evidence from the period 1900-1906, brought together by several international film archives, at the Congress' screenings for an audience of international film scholars and film archivists has led to a re-evaluation and revision of that period of film history. The second section addressed the case of a specific film archive (Nederlands Filmmuseum), which in the late 1980s and early 1990s centred on (the aesthetics of) its own archival collection, instead of the established film canon and how, as such, it has been responsive to historiographic shifts. In both cases, it was 'forgotten' material, often devoid of a legal status, that was not seen as marginal anymore and the new approach of the resulting revisionist film history, in which the archival films themselves were considered, seen and examined, changed the concept of the archive as a primary source.

The new form of film historiography wished to explore the archival gaps that the traditional historiography had actively overlooked. The film archive, however, turned out to be fragmentary in itself, not only on the level of the (incompleteness of the) collection of films, but also on the level of the actual films. New Film History, made by archivists and helped by academics revised a particular kind of film history by actually seeing the films. The film archive was not seen as *terra incognita*, as

uncharted territory, anymore: the ‘conglomerate of broom closets full of beautiful rubbish’ was opened and the film archive became a potential primary source for film history writing.

The particular part of the fragmentation that the chapter addressed was that extant archival film material in a revisionist spirit was taken into consideration; it was looked at, described and analysed. Some of that film material, such as unidentified film fragments, is currently at the centre of the orphan works debate, which will be the focus of chapter three. In the following chapters, the archival fragmentation, and the hierarchy between extant, available and publicly accessible film material will be examined through a legal cross-section of the film archive and its resultant quadrants will be systematically addressed in chapters two, three and four.

2 A SWISS BANK

Introduction

The previous chapter has centred on historical examples of the importance of availability and accessibility of archival film for the construction and potential revision of film history writing. Availability and accessibility of archival film have remained topical. Copyright can be seen as an important filter that shapes the availability and accessibility of archival film, currently inflected by digitisation and a focus on public access to the archive based on new funding structures. On the one hand, the film archive is subjected to copyright law, against the constraints of which it can be seen to resist. On the other hand, the archive makes productive use of copyright in its involvement in the interplay between the ownership of the physical objects and the ability to control the subsequent use and dissemination of those objects. These practices are most exemplified in public access to the orphan film (the topic of chapter three), the public domain film (the topic of chapter four) as well as a particular artistic intervention of re-using archival film (the topic of chapter five).

In the next chapters the filter of copyright ownership will be used to indicate that not all material is or can be (made) available by highlighting how much of the filmic evidence that is kept in the archives is publicly accessible. Chapters two, three and four will address a further fragmentation and some of the film archival consequences of copyright in detail, based on a re-categorisation of the film archive according to the copyright ownership status of its film holdings, as well as access to

the works in the resultant quadrants. This chapter will address parts of quadrants 1 and 2 which encompass ‘the copyrighted film’ and will include such topics as the paper print collection of the Library of Congress, which highlights that a method of complying with a technicality in the copyright law became an inadvertent means for recovering film history, and the colourisation debate of the 1980s, which highlights that the dichotomy between intellectual property and physical property and the resultant tension for archival access exposes the film archive as a vulnerable place. Final example in the chapter will be a film that was under embargo, *ALS TWEE DRUPPELS WATER* (*THE SPITTING IMAGE*, NL 1963, Fons Rademakers) in a public sector film archive, despite its specific remit of preservation, restoration and dissemination. It took nearly four decades for the film to return to the screen and it is currently regarded as one of the most important post-WWII Dutch feature films. An inhibited visibility of important works of film that are arguably crucial to an understanding of the past is the result if a film archive cannot provide access to its holdings and therefore cannot engage with the dynamics of history. The film archive can be seen as a ‘Swiss bank’, with an obligation to maintain confidentiality about its holdings in the interests of its ‘account holders’. Copyright fulfils a protective function for rights holders while it simultaneously plays a more constraining and limiting role in relation to film history. The particular part of the fragmentation to consider in the context of this chapter is that extant does not equal available. Availability is a concept worth unravelling, as it is part of a fragmentising effect that includes considerations of institutional factors, such as restoration practices, but also copyright restrictions.

The chapter will comprise four different sections: part 2.1 will address the re-categorisation of the archive based on the legal status of the film material that will be

the structuring element of the next three chapters; part 2.2 will address those films of which the archive owns the rights, a section that is fairly small, and can consist of, for instance, films by individual filmmakers who have (partially) donated their holdings to the archive. Section 2.3 highlights films to which an external, *known*, party owns the rights and can include studio material deposited by distributors. In this section, the dichotomy between intellectual and physical property will be emphasised, a concept that underpins all further discussions, by highlighting the colourisation debate of the late 1980s. Part 2.4 will highlight ‘the embargoed film’, films under copyright but which are not available, specified by restrictions by the copyright holders, which is particularly a concern in a public institution with its remit of preserving and providing access to its holdings.

2.1 Fragmentation and Re-Categorisation

Matthew David and Debora Halbert write in the introduction to their edited volume *The SAGE Handbook of Intellectual Property* (2014, p. xli) that “while the debates surrounding issues of intellectual property are not new, the political, social, and technological context within which these debates are made remain very relevant and continue to evolve”. In characterising the 1950s in predominantly European film archiving, Raymond Borde (1983, p. 121) describes “the arrival of a redoubtable personage in the sleepy and peaceful landscape where the film archives live: the rights holder”. For several decades, rights holders were seen as a nuisance; Borde refers to them as “alligators” living in the swamps “where the archives had led their historic mission of cultural preservation” (Borde, 1983, p. 121). In a recent publication, Eric de Kuyper (2013, p. 121) has described the time that Borde depicts as one in which “secrecy belonged to the prevailing attitude of film archives”. Each archive held its treasures as secret as possible and most of them did not have a real accessible catalogue, which De Kuyper (2013, p. 128) attributes mostly to much of a collection originating from dubious sources: “the legal status of the archive was not clear and would remain that way for quite a while”. De Kuyper (2013) argues that at the time he was employed at the Nederlands Filmmuseum, the time of the pioneers, such as Langlois and Ledoux, was over: new generations spearheaded the major archives and started to replace the previous generation with a time of more transparency and collaboration.

The subject of this thesis can be seen as fragmentation, and more specifically, as the different levels of fragmentation that can be seen to coincide in an archive. The fragmentation does not only apply to the way it has been constructed, so, fragmentation in building a collection or restoring its holdings, but it also, as will be

argued in the remainder of this thesis, applies to a certain fragmentation in film archival access imposed by a legal structure through which a hierarchy between extant, available and publicly accessible material can be unravelled. In the introduction it was argued that copyright could be seen as an important filter that shapes the availability and public accessibility of archival film and therefore colours our understanding of the larger narrative. The research in the context of this thesis identified the need to re-categorise archival holdings based on their copyright ownership status: it arose to be 'freed' from other arbitrary, but more established, categories such as country, director, genre or film carrier in order to analyse the difference in how access to the materials is provided. It has resulted in a cross-section with four quadrants, each representing a particular copyright ownership situation plotted against its potential availability. Although collections of most film archives will also comprise non-film elements, such as posters or photographs, this chapter, and thesis more generally, will concentrate exclusively on film holdings. This chapter as well as the following two chapters will look at that re-categorised archive and the resultant quadrants in detail in order to unravel some of the relationships between who owns what and notions of extant, available and publicly accessible material evidence. A cross-section based on copyright ownership irrespective of what other archival categories the films belong to allows for a so-called meta-perspective and an examination of what kinds of problems occur in which kinds of groups of films. It will unravel some of the contemporary economics of archival access, such as exclusive ownership, a financial responsibility for the continued preservation of a work and a human agency behind some of the decision-making involved.

The quadrants will each be addressed systematically in the following chapters and will be illustrated with examples from the collection of EYE as well as with

international debates. An interesting cascading effect can be observed as the copyrighted works from quadrant one will shed their light on the issues of the orphan works of quadrant two, which in turn will expose the public domain works of quadrant three and four as problematic in their own right. Orphan works and public domain ones will be the more elaborate subjects of chapters three and four, but a tentative conclusion here is that when even the works that have no legal restrictions (public domain) can be exposed as problematic, placing the orphan works problem exclusively in a legal paradigm needs rethinking.

2.2 Archive as Rights Owner

The most obvious result of a legal cross-section of an audiovisual archive is that there is a section that includes the films under copyright. Both in the EU and in the US, copyright currently lasts for a term of 70 years beyond the date of death of the author. In general, this means that most films are still under copyright. In most public but also private archives, works in copyright will comprise the largest majority of the works held. As mentioned in the introduction, the dichotomy between the intellectual ownership and the physical ownership of archival material and the resultant tension for access can be illustrated clearly in the case of a public institution with its specific remit and practices of film preservation and dissemination. The idea/expression dichotomy in copyright law stipulates that an idea cannot be protected whereas an expression of that idea can (Bainbridge, 2012). A further divide in copyright law is that copyright in a work pertains to the intangible work and will normally be exercised separately from the material property (Dusollier, 2010). All these separations need to be acknowledged when researching the intersection of copyright ownership and the public audiovisual archive.

In the case of a commercial archive, copyrighted films to which the archive owns the rights would be the large majority of the holdings. As such, it would be fairly ‘simple’ to initiate a film restoration project, to invest a large sum of money into the project and to reap the benefits of this investment afterwards. Furthermore, the investment can easily be made as a secure copyright situation protects against a possible infringement after the film has been made public. Examples are such recent film restoration projects as *THE BRIDGE ON THE RIVER KWAI* (US 1957, David Lean) or *TAXI DRIVER* (US 1976, Martin Scorsese), both by Sony Pictures Entertainment.

Based on the kind of archive that is central in this thesis, the section of films to

which the archive holds the rights is the smallest. The archive will own the rights to very little material only. In the light of the analysis in this thesis, which centralises availability and public accessibility of archival film, this means that this is the only material aside from the public domain material for which the archive does not have to seek permission from a rights holder. It also means that it is this material as well as the public domain material that is (in digitisation efforts, for instance) at the core of what Ronan Deazley calls the “significant opportunity for interplay between the ownership of the physical object ... and the ability to control the subsequent use and dissemination of the work” (2006, p. 124). This idea will be further unpacked later, most particularly in the context of the public domain in chapter four.

In the context of a public archive, it is a different scenario. A production company or filmmaker sometimes donates their film elements to a public archive, and with them the whole or partial rights to the films. Specific limitations are usually laid down in a contract. In the ideal case for the archive, all the rights will be transferred in the case of a donation or deposit, so that the archive is free to pursue access and dissemination activities, such as a restoration project, but in practice it is to very little material that public archives own all rights. Possible restrictions may include the reservation that the archive must report to the particular filmmaker when the films are used, or contractually it can have been agreed that any proceeds be shared between the rights holder and the archive. In the case of EYE this is also the situation: aside from the material that is in the public domain and therefore belongs to the archive physically, the archive owns all the rights to very little material. For incidental filmmakers and certain collections, contractual agreements have been reached that possible profits will be shared, and only in the case of a few production companies

have all the exclusive rights been transferred to EYE.¹ The case of EYE is not unrepresentative; general counsel of the British Film Institute Richard Brousson is quoted in 2009 in the annual BILETA conference transcript (Derclaye, 2009) that the BFI was only permitted free of charge to provide public access to little more than 5% of the whole of the national collection, which means to material to which rights are owned by the BFI or which is out of copyright.

A famous example of a collection of films that first belonged to third party rights holders but then later to the holding archive as physical property after the works had fallen in the public domain is the paper print collection at the Library of Congress.² The paper prints were received at the Library of Congress between 1896 and 1915 from the first generation of film producers (Loughney, 1988). In the early 1900s, films could not be deposited as motion pictures: until 1912, when the Townsend Act was passed, “there were no motion picture provisions in copyright law” (Allen and Gomery, 1985, p. 31). Films were therefore copied onto bromide photographic paper and deposited as a series of individual photographs, as it was possible to deposit photographs for copyright. As the US’ repository for copyrighted material, the Library of Congress could be seen as the first public film archive: “probably the most significant early film collection in the United States was collected quite by accident as a result of early film companies attempting to ward off piracy and bootlegging” (Jones, 2012, p. 35). However, the effort had nothing to do with collecting film or with film art, but “rather to protect its economic value as a product: copyright” (Allen and Gomery, 1985, p. 31). Several decades later when several

¹ Information provided by Ronny Temme (former Head of Sales EYE) in email dated 1 February 2014 and by Leontien Bout (EYE’s legal counsel) in phone conversation on 13 March 2014.

² A similar ‘collection’ existed at the British Film Institute: the British Film Copyright Archive. As opposed to the Paper Print Collection at the Library of Congress, the British Copyright Archive consisted of individual frames only. For a detailed description of the origins, history and composition of the Paper Print Collection at the US Library of Congress, see Loughney, 1988.

thousands of these paper prints were rediscovered in a vault in the Library of Congress, the prints turned out to be the only surviving material of the films. After a series of restoration efforts, the films became available in 1967 and can be seen as a source for both a cross-section of what films were exhibited but also of popular culture more generally at the turn of the previous century (Loughney, 1988). Film scholar Gabriel Paletz (2001, p. 71) has contextualised the recovery and restoration efforts in terms of their further historiographic importance: “Because of an economic interest ‘an ingenious method of complying with a technicality in the copyright law’ ... became the inadvertent means for recovering film history”.

2.3 Third Party Rights Owner: Fragile Relations

When a film has an identified and located copyright holder, who to ask for permission is clear. It is not to say the particular permission actually will be given, but a negotiation can be started. In general, a public archive can collect, preserve and provide on-site access to films that have a third party rights holder, but cannot distribute them commercially without the specific permission of the rights holder. All sorts of limitations, such as the specific nature of access and distribution specificities are usually determined in a contract upon the donation or deposit of the film material. However, contracts in which this kind of information is determined often do not exist for the older material in an archive.

It is quite common in the case of a public archive, such as EYE, that some of their film elements to which they do not hold the rights end up being used in international collaborative film restoration projects. Someone outside of the archive, often the rights holder, for instance another archive or a producer, initiates restoration projects and in exchange for lending some of their film elements, the loaning archive gets attributed in the credits, for instance, or in an arguably better case scenario ends up receiving a restoration copy for its own collection. A few recent restoration examples for EYE are *DOWNHILL* (UK 1927, Alfred Hitchcock), in collaboration with the BFI in 2012 and *MAUDITE SOIT LA GUERRE* (B 1914, Alfred Machin), in collaboration with the Belgian Cinémathèque royale in 2014.

As mentioned in earlier parts of this chapter, the idea/expression dichotomy in copyright law stipulates that an idea cannot be protected whereas an expression of that idea can (Bainbridge, 2012) and a further dichotomy in copyright law is that copyright in a work pertains to the intangible work and will normally be exercised separately from the material property (Dusollier, 2010). Yet another split that came to

fruition in the late 1980s was between copyright owner and other creative talent. Some of the debates throughout the last few decades on legal issues and the audiovisual archive find their basis in these distinctions. In a way, even the current orphan works debate, which will be highlighted in the next chapter, can be reduced to this distinction: intellectual versus material property. In the case of the colorisation debate in the US of the late 1980s, the hierarchical distinction between extant archival material and what part of the extant material was available and, in turn, what part of the available material was publicly accessible came under pressure: the colorisation controversy instilled the fear that the black and white films that everybody knew might be replaced by colourised copies, with no access to the black and white originals in the archive.

Although experiments with colorisation were being done for some years, the controversy really picked up speed when media mogul Ted Turner bought the MGM and RKO film libraries in 1986 and 1987 respectively, which included the copyright to the films. Turner announced he wanted to colourise the films. Potential returns were high because as colour titles, as opposed to black and white ones, they could be programmed on television in prime time (Slide, 1992). Turner had his own television channels to distribute the materials, and this presented a gigantic “corporate coalition that controlled both the copyrights and the ancillary markets” (Edgerton, 2000, p. 25).

Films originally shot in black and white were colourised with the help of digital technology. What is important to mention is that it was a video copy of the films that was colourised, while the original black and white film elements were left ‘untouched’:

The team’s first task was to take the best available copy of the film and transfer it to one-inch videotape. For the purpose, Turner had a freshly minted print struck from the original negative. This pristine celluloid copy was then dubbed

onto videotape, and a digital computer was used to further enhance the picture by removing any discernible blemishes. (Edgerton, 2000, p. 28)

Colorisation can be seen as a broadcast issue as in its finalised form the film only exists as videotape; the colourised version cannot be projected as a motion picture (Slide, 1992). The process of colorisation does not effect the original camera negative or another master and preprint film elements. It has been said that the process of colorisation might in fact help preserve a title, as the best possible black and white element needs to be struck from which a digitisation is made in order to start the colourising (Slide, 1992).

The colourisation controversy can also be seen as an archival issue as the archive would soon find itself on shaky ground as the stability of the film canon was at stake. Films that were in or were about to enter into the public domain were granted another 75 years of copyright protection; as a derivative work it could be seen a new original work:

One of the major advantages of the colorization process and its competitors was that by adding color to black-and-white films, it was possible to copyright them as new titles, thus adding additional years of copyright life to a copyright protected black-and-white feature and starting a whole new copyright life for a film already in the public domain. Of course, the colorization process does not affect the copyright status of the black and white original. (Slide, 1992, p. 124)

The Library of Congress confirmed the difference of the colour-converted CASABLANCA (US 1942, Michael Curtiz) from the original by awarding a new copyright to the Turner Entertainment Company in July 1988, a decision in which it was determined that a minimum of three added colours to a black-and-white film were needed to legally copyright the new version as a separate work (Edgerton, 2000).

In the context of this thesis and this chapter in particular, the idea that colourisation was a method that was used to lengthen the duration of copyright protection of one's property, is an important point because it exposes the copyright holder of a film as the powerful person in terms of what they are able to do with the work irrespective of who owns the films 'creatively' or materially. When the holding archive is a public institution the tension is great: it holds numerous films physically with the remit of preserving the work and making it accessible while someone quite different can prevent some of the activities underpinning that remit.

Colour conversion made an investment seem profitable and Turner spent approximately two million US dollars to colourise his RKO films. The fact that he was the rights owner to the films was the most important factor to do so:

It's only feasible to convert to color if you own the world rights, since the cost would be prohibitive for small markets. ... [Turner] might have hesitated to pay 1.2 billion USD for a film library if the pictures had soon lapsed into the public domain. By converting them to color, though, he could get a fresh copyright, which would be valuable for years to come in the broadcast and cassette markets. ... the companies were trying to conjure private property out of the public domain. (Klawans, 1990, p. 175)

The arguments for colorisation often took a teleological stance: if the filmmakers would have been able to, they would have shot the films in colour, based on the underlying idea that black and white is a primitive version of a colour film. Most of the filmmakers themselves initially deemed the process interesting; Frank Capra, for instance, was an early adopter, but when it became clear their permission was not needed for the colourising process, as in most cases the filmmakers were not

the rights holders or the film had already lapsed into the public domain and no permission was needed at all, most of them became vehemently against the practice³.

The controversy turned into an ethical point of view as the practice would condone a so-called falsification of history. Anthony Slide (1992, p. 127) explains that the copyright holders were seen to have an “ethical responsibility” to protect and preserve the artistic integrity of black and white films. Colourisation was seen as “cultural vandalism and a distortion of history” and an “unwarranted intrusion into the artistry of the cinematographer” (Slide, 1992, p. 129). The filmmakers themselves would even focus on the rights of the mass audience, as they could not be robbed of their films as their sensibilities would be corrupted (Edgerton, 2000). Turner relished in the controversy and welcomed all sorts of accusations, provocatively telling reporters at a press conference in the summer of 1988 that he “colorized CASABLANCA just to piss everybody off.... I wanted to do it and it’s mine” (Slide, 1992, p. 126). The audience, in turn, did not seem to care all that much: they watched the broadcasts and they bought the videotapes, *en masse*, but as soon as the novelty wore off by the early 1990s they had lost interest (Edgerton, 2000).

Film archives have for several decades preserved colour films in black and white in their preservation and restoration practices, both for monetary reasons as well as for long-term chemical stability reasons (Read and Meyer, 2000). Although film scholars have addressed these preservation details in the context of film historical practices (see for instance Lameris, 2007), they have gone by fairly unnoticed and have not been framed in the context of ‘a distortion of film history’.

³ Directors spearheading the crusade against colourisation were, amongst others, Frank Capra, Woody Allen and John Huston; director Orson Welles, on the other hand, could base himself on a clause in his contract that prevented any tampering with his work and so, he could prevent the colourisation of CITIZEN KANE (Slide, 1992).

Panning and scanning⁴, lexiconning⁵ and other editing functions have been used to present a theatrical film in television format before (Kohs, 1988). Motion pictures have been a television staple for decades, with distortions and alterations such as frame cropping, the censoring of dialogue and frequent commercial interruptions as a consequence (Edgerton, 2000). Panning and scanning, although creatively controversial in their own right and often opposed by the filmmakers themselves, have also not been framed in the context of a potential distortion of film history before.

Why was the inverse of the standard archival practice, the colourisation of black and white films, all of a sudden such a controversy? In this chapter, it will be argued that it was the realisation that the archive could not be a safe haven for an ‘official’ film history that was so unsettling. The stability of the film canon was at stake, and with it the ontology of film. What one thinks film is can change when it becomes clear that certain titles can only be accessed in a way or in a version that differs dramatically from the way the film is remembered. The idea of what film is might have to start with an idea of what intellectual property is, or a renewed idea of what intellectual property is, as it is a historically and culturally contingent concept in itself.

A larger discussion of the colorisation controversy is embedded in the artist’s moral rights. “The fundamental difference between the American and European systems of copyright was brought to the forefront by the colorization controversy” (Kohs, 1988, p. 28). One system favours ownership, the other the creative person

⁴ This is a process by which theatrical motion pictures, composed for viewing on large screens, are altered to fit on the narrower television screen (USCO, 1989, p. 6).

⁵ This technology involves the electronic time compression or expansion of a motion picture in order to fit the picture into broadcast time slots (USCO, 1989, p. 6–7).

behind the work. The crux of the controversy has often been expressed as essentially “one of ownership versus creative rights” (Kohs, 1988, p. 7).⁶ The legal situation in Europe with a focus on moral rights stipulates that the maker (who is not the rights holder) can object to any distortion or modification, which would constitute a misrepresentation of his artistic vision.⁷

One of the outcomes of the colourisation controversy was the establishment of a national film commission with the purpose of building a National Film Registry, a canon of distinguished films. “The National Film Preservation Act, part of a Department of the Interior appropriations bill, create[d] a 13-member panel that could name up to 25 movies a year to be included in a national registry of classic films” (NYT, 1988), which are “culturally, historically, or aesthetically significant films” (Slide, 1992, p. 131), showcasing the range and diversity of American film heritage to increase awareness for its preservation. Whether the name of the bill reflected what it was supposed to do has been questioned:

The name of the bill [The National Film Preservation Act] is, of course, a misnomer. It has nothing whatsoever to do with film preservation. All the bill does is have the Librarian of Congress, in collaboration with his appointed panel, select 25 films a year *which can still be altered in any way by their copyright owners*. (Slide, 1992, p. 131, *author’s emphasis*)⁸

⁶ A current version of the same debate can be seen in what has been dubbed ‘dimensionalisation’, converting films to 3D (Hoyt, 2011).

⁷ John Huston’s heirs, for instance, fought to have a colourised version of his MGM-produced film *THE ASPHALT JUNGLE* (1950) not broadcast after his death. Turner had the film colourised and in the US, Huston’s heirs could not fight a broadcast, as the US does not recognise moral rights of the director. France, however, does. When the film was scheduled to be broadcast in France Huston’s heirs tried to object to the broadcast there. The final ruling of the case came to late for the actual broadcast in 1988, but in 1994, “a French trial court permanently banned the television broadcast of a colourized version of John Huston’s *THE ASPHALT JUNGLE* on the basis that it would cause ‘unmendable and intolerable damage’ to the integrity of the work and would therefore compromise Huston’s moral rights” (Grainge, 1999, p. 636).

⁸ In the UK, the situation was dealt with differently. A call for action by the British government brought a response from the Department of Trade and Industry: “Where copyright still subsists then it is a matter for the copyright owner, and not the Government, to decide whether or not to allow coloured reproductions to be made” (Slide, 1992, p. 129).

The Act, however, did and could not protect the so-called safety of the film titles, if at all possible: “The longest anyone would be able to thwart the colorization process would be a period equal to the duration of the copyright in the film itself. After this period ... the film falls into the public domain and anyone is free to make a colorized version” (Kohs, 1988, p. 19). If they were indeed altered, by colourising or other technologies, they would be required to forewarn the viewer with a label indicating that they had been done so “without the participation of the principal director, screenwriter or other creators” (NYT, 1988). The same disclaimer had to be shown at the beginning and the end of the film if it was broadcast on television.⁹

The real question underpinning the colourisation controversy seems to be what ‘official’ film history is or where it might reside. The controversy has been expressed in the context of a fear for a falsification of film history:

A persuasive argument made by opponents of colorization involves not the preservation of artistic integrity, but rather the preservation of cultural heritage. Films made in the black and white era capture and record the heritage and culture of a time now passed. To present altered versions of these films, it is said, is akin to presenting an altered version of American history. Instead of educating the young as to the worth of these original films and their era, colorized films instead present a faddish and distorted view of history. (Kohs, 1988, p. 36)

Part of that fear might even be justified: given the tremendous financial investment required for colorisation, “it is likely to be the colored version, which will, perhaps exclusively, be marketed. The public cannot [easily] go into the archive and see the original black and white print. As a result, original black and white works might indeed be effectively replaced by colorized copies” (Kohs, 1988, p. 30). Not all of the filmic evidence that is kept in the archives is accessible. The colourisation debate

⁹ Interesting detail was that if less than six minutes of a feature length film had been altered (or removed), it did not need to carry a label (Slide, 1992).

made it obvious that what was extant was not necessarily available and that which was available was not necessarily publicly accessible. Some of the material was now under threat to only be publicly accessible in a different form.

The colourisation debate brought to light the dichotomy between intellectual ownership and physical ownership (and what perhaps could be called the audience's 'cultural ownership') and the archive was exposed as a vulnerable place; as a protector of film and the audience's memories it was not a safe haven:

... the innovative technologies that brought about the ability to replicate and exhibit films inexpensively also created the capacity for people outside of the archival setting to alter the content and meanings of canonical films. ... Colorization technology also revealed a significant and troubling fact about the cinematic artefact: powerful people and new technologies could dramatically alter films sitting safely in the archive. The film archive...hardly guarantees a fixed and stable cinematic memoryscape. (Jones, 2012, pp. 18–19)

Not only the archive was on shaky ground, but also the writing of film history, as “filmic meaning was not necessarily tied to or correlated with the cinematic artifact protected in the archival vault” (Jones, 2012, p. 78). It cannot be said that before colourisation the viewing public was breaking down the archive doors to see most of these original black and white films (Kohs, 1988), but what it did emphasise is that the film archive “could not maintain, protect, or help to construct a singular cinematic meaning for any film” (Jones, 2012, p. 78). The stability of the cinematic canon was called into question if films could easily be altered and their carefully constructed place in film history could be unsettled.

Janna Jones' 2012 publication *The Past is a Moving Picture: Preserving the Twentieth Century on Film* addresses film archiving in the 'analogue era' only and is framed to stop before digitisation as a technology sets in, which is a pity as there is an analogy between digitisation and the colorisation controversy to uncover. The

colorisation controversy can be seen as a precedent of digitisation and the orphan works problem, which was brought to the fore by mass digitisation efforts and new funding structures. Although they are very different ‘controversies’, both technologies can be seen as copyright controversies that are firmly rooted in a context of film history and the understanding of film.

Both the colorisation debate and digitisation threaten(ed) the established position of the archive, as well as question and undermine the film’s and the film archive’s status as a primary source. Both debates emphasise the dichotomy between intellectual and physical ownership and both expose a delicate membrane between the archive and the outside world by showing some insight into some of the workings of ‘doing’ film history in the context of a film archive. In this thesis these debates are seen as some of the factors at play in the hierarchical relation between extant, available and publicly accessible archival film. ‘Doing’ film history in the context of the film archive should always be seen in light of a certain fragmentation of accessible material that takes place in the film archive.

2.4 The Embargoed Film

EYE Example: ALS TWEE DRUPPELS WATER (NL 1963, Fons Rademakers)

The embargoed film is another example of the intellectual versus the physical property dichotomy. Although it is the public archive's remit to preserve its holdings and to provide access to them, sometimes this cannot be done, at all or under specific conditions only, placed on the work by the rights holder. In the context of EYE, ALS TWEE DRUPPELS WATER (THE SPITTING IMAGE, NL 1963, Fons Rademakers) was one of those titles. The film was extant, potentially available but not publicly accessible for several decades.

Director Fons Rademakers needed 40% additional funding for his film to supplement the financing he received from the national Production Fund for Dutch Films (*Productiefonds voor Nederlandse Film*) and approached several rich industrialists (Barten, 2002). He ultimately found a partner in beer tycoon Freddy Heineken who was looking to break into film producing and wanted to finance the additional budget exclusively (Barten, 2002). By financing and producing the film, Heineken became the rights holder of the film.

The film was an international success, not in the least because of cameraman Raoul Coutard's work, who had just finished such hits as *A BOUT DE SOUFFLE* (F 1960, Jean-Luc Godard) and *JULES ET JIM* (F 1962, Francois Truffaut) (Welgraven, 2001). The film played in competition at the International Film Festival in Cannes in 1963 with such films as Visconti's *IL GATTOPARDO* and *OTTO E MEZZO* by Fellini (Barten, 2002) and ended up being nominated at the festival for a Golden Palm.

In 1966, the film was broadcast on Dutch television for the first and only time, and after that Heineken's production company stopped focusing on film production

but defended the company's rights "like a lion" (Barten, 2002, p. 24). Heineken denied Rademaker's later request to acquire the film's rights, allegedly retaliating against an ex-girlfriend who had played a role in the film and who had broken off the relationship with Heineken. Effectively, this meant that as the rights holder, Heineken withdrew the film from circulation and what was considered to be, according to Dutch newspaper *Het Parool*, a "courageous film noir of European stature" (Barten, 2002, p. 23) vanished into thin air. The reason why Heineken withdrew the film is actually quite unimportant, however, the fact that he could at all is very important. The rights holder as the sole decision maker in what happens to a film, as opposed to for instance the director, is a direct re-run of the examples in the previous section, in which "the right to exploit his creative contribution or object to an alteration of the same, is not the director's to assert" (Kohs, 1988, p. 10). It is the right holder's.

After the film had been withdrawn from public viewing, it was screened a few times at special occasions, such as a Rademakers retrospective, after express permission by Heineken. One could also see the film in private viewings at Heineken's if he gave permission, however, further cinema and television screenings were out of the question. Heineken obstructed the film's television broadcast in the 1980s, ostensibly to not miss home video revenues (van Driel, 2003). Rademakers learned from his experience on *ALS TWEE DRUPPELS WATER* and ended up producing all his subsequent films himself (Beerekamp, 2002). This meant he was the copyright owner himself and was in charge of what happened to the films.

Heineken passed away in early 2002 and negotiations were re-opened with Heineken's heirs, who agreed to re-distribute the film (Bracht, 2012). The film was

restored¹⁰ and re-premiered in September 2003 at the Nederlands Film Festival in Utrecht after having been out of the Dutch audience's collective memory for several decades. It was heralded for its complex portrayal of the Second World War, as opposed to other films of the same era. *DE OVERVAL* (*THE SILENT RAID*, NL 1962, Paul Rotha; about which more in the next chapter on orphan films), for instance, confirmed the prevailing Dutch image of the war: sober and humble heroes who defended themselves against the occupiers. *ALS TWEE DRUPPELS WATER*, however, suggested deeper philosophical questions of whether right and wrong, truth and lies, betrayal and resistance are what they seem; can reality really be known and is a morally correct choice at all possible (Schoots, 2004)?¹¹ The film is now considered one of the most important post-war Dutch feature films.

Powerful rights holders might change the form and version of films with the advent of a new technology or might keep films out of the public realm altogether. If films are potentially available but not publicly accessible, their possibilities to engage with the dynamics of history and to reach their potential for history making will be severely limited.

¹⁰ The restoration of the film was supervised at the Nederlands Filmmuseum by Martha Blassnigg.

¹¹ Another example of an embargoed film in the collection of EYE is *ICH KLAG' AN* (*I ACCUSE*, DE 1941, Wolfgang Liebeneiner). The so-called *Vorbehaltsfilm*, about which more in chapter five, is a Nazi-authorised film about euthanasia deposited in the archive of EYE under the restriction that it can only be shown in conjunction with a particular public lecture and with specific permission from the German foreign ministry.

Conclusions

In this chapter a start was made with the systematic analysis of the access to the works in the resultant quadrants of a legal cross-section of a national film archive according to the copyright ownership status of its film holdings, as presented in this thesis on p. 38. The chapter focused on several issues of the copyrighted film pertaining to quadrant 1 and a part of quadrant 2 and has used the colourisation debate of the 1980s to highlight that the dichotomy between intellectual property and physical property and the resultant tension for archival access exposes the film archive as a vulnerable place. As a result of the debate, the hierarchical distinction between extant archival material and what part of the extant material was available and, in turn, what part of the available material was publicly accessible came under pressure.

A further example in the chapter of the dichotomy between intellectual and physical ownership was a film, *ALS TWEE DRUPPELS WATER* (*THE SPITTING IMAGE*, NL 1963, Fons Rademakers), which was initially under embargo in a public sector film archive. Despite the archive's specific remit of preservation, restoration and dissemination, it took nearly four decades for the film to return to the screen. The film is currently regarded as one of the most important post-WWII Dutch feature films.

An inhibited visibility of important works of film that are arguably crucial to an understanding of the history of film, and arguably history at large, is the result if a film archive cannot provide access to its holdings. The film archive can be seen as a 'Swiss bank', with an obligation to maintain confidentiality about its holdings in the interests of its 'account holders'. Copyright fulfils a protective function for rights holders while it simultaneously plays a more constraining and limiting role in relation to film history writing by limiting the films' potential for history making. The

particular part of the fragmentation that was considered in the context of this chapter is that extant does not equal available. Availability is a concept that needs unravelling as part of a fragmentising effect that includes considerations of institutional factors, such as restoration practices, but also copyright restrictions. The next chapter will focus on the other part of quadrant 2, the orphan films: films without a located or identified rights holder, which raise particular difficulties in the context of archival access debates.

3 A TEMPORARY PLACEHOLDER

Introduction

In the previous chapter a start was made with a re-categorisation of the film archive according to the copyright ownership status of its film holdings and focussed on access to copyrighted films. This chapter will examine the phenomenon of the orphan film; a film without identified or located copyright owner, which raises particular difficulties in the context of digitisation and archival access debates. It will use DE OVERVAL (THE SILENT RAID, NL 1962, Paul Rotha) as an illustrative example to show how untraceable copyright owners, and the consequent inability to clear the rights in such a work, can halt or significantly delay the distribution of archival film. Copyright then functions restrictively for film history, but in contrast to the examples in the previous chapter it does not protect right owners if they are not aware of their owning rights. The legally uncertain category of orphan films will characterise the film archive as a ‘temporary placeholder’, as a safety net and a warehouse for (absent) rights holders. When films can legally not be re-used, sometimes the archive decides to go ahead with the re-use anyway, based on a risk analysis. In its resistance to some of the applications of copyright law, the institution that controls the evidentiary products can be seen to actively shape access to its film archival holdings. The particular part of the fragmentation that can be discerned in this chapter is that extant material, despite its legal unavailability, *may* be made available based on the agency of the film archive and its staff.

EYE Example: DE OVERVAL (NL 1962, Paul Rotha)

The 1962 Dutch feature film *DE OVERVAL* (*THE SILENT RAID*, NL 1962, Paul Rotha) tells the story of a silent raid on the House of Detention in the city of Leeuwarden in the north of the Netherlands in December 1944. In this raid, a small group of men forced their way into the penitentiary and liberated 51 members of the resistance movement. The film holds a special place in Dutch history and film history since it was the first feature film that dealt with the Second World War resistance movement.

In 2003, the Nederlands Filmmuseum and the Frisian Resistance Museum made an attempt to publish *DE OVERVAL* on DVD. The project had been placed on hold several times before. What had stalled the project before was the failure to answer the question of who owned the copyright of the film, as it was not obvious. Publishing the film on DVD entailed both reproducing the work and communicating the work to the public, both copyright restricted activities, and so permission needed to be obtained from the rights owner. The Frisian Resistance Museum had a large constituency of interested consumers with an appetite for the film, but held no original film elements. EYE held the original film material, but not the copyright.

The first step in determining the film's current copyright owner was to establish whether the film was still in copyright at all. Article 40 of the Dutch copyright law (*Auteurswet*) states that the

... copyright in a cinematographic work shall expire 70 years after 1 January of the year following the year of death of the last of the following persons to survive: the principal director, the author of the screenplay, the author of the dialogue and the composer of the music created for use in the work.¹

¹ Unofficial translation by Mireille van Eechoud, professor of Information Law at the University of Amsterdam, which has been published as an annex in Hugenholtz, B., Quaendvlieg, A. and Visser, D. (eds.) (2012) *A Century of Dutch Copyright Law: Auteurswet 1912–2012*. Amsterdam: deLex. The translation is called 'unofficial' because Dutch laws are established in the Dutch language only and

The author of the screenplay, for instance, Dr. Loe de Jong was still alive in 2003, so the term of protection was indeed still active.

The next step in establishing who owned the copyright was trying to uncover who owned it first. Although the contracts that would prove ownership were missing, it was assumed that the film was made in the course of employment and that therefore Sapphire Film Productions as the employer was the first copyright owner of the film. To track the production company's history, trade papers were researched at the Chamber of Commerce in Amsterdam². In 1973, Sapphire Film Productions went bankrupt and was purchased by Tuschinski Film Distribution BV. Information in the trade papers, such as names of former owners as well as bankruptcy curators were thought to be instrumental in helping to determine what happened to Sapphire's assets after its purchase. However, none of the contact information was up-to-date. Less official leads were also investigated and contact was established with numerous individuals connected to the film or its production company: former owners of Tuschinski, the company that bought Sapphire upon their bankruptcy and their children (as possible heirs); the archivist at Pathé, the company who currently owns the Tuschinski archive; directors of the other films produced by Sapphire and their children, as the copyright situation of their films might help elucidate what happened to DE OVERVAL; film distribution companies that distributed the film and film archives that had film prints and donation files as information in those records and a possibly financial trail might have helped clear up the copyright situation. After several months of research the turning points in Sapphire's company history remained obscure and there was no conclusive answer to the copyright ownership question.

therefore the translation itself is not legally binding (information provided by legislative lawyer Just van der Hoeven in personal email to author on 10 March 2015).

² Amsterdam Chamber of Commerce dossier number: 33097271.

Despite the lack of an identified copyright owner, the Netherlands Filmmuseum decided to pursue the DVD production of the film. A different archive might, of course, have taken a different decision. The particular risk, based on the history of the use of the material, and therefore the possibility of the copyright owner appearing after publication, was taken based on the assumption that the record of the attempts that were undertaken to trace the possible owner could possibly be used as a future indemnification should a rights owner come forward.

In 2003, *DE OVERVAL* was one example of a problematic title in one specific archive, and at the time of this writing, more than ten years after the initial research took place, the copyright situation has not been resolved and the film's ownership has not been claimed³. *DE OVERVAL* is a so-called orphan work, a work without an identified or located copyright owner, and is part of a larger orphan works problem. The film is an illustrative case study to show how untraceable copyright owners, and the consequent inability to clear the rights in such a work, can halt or significantly delay the distribution of archival film. Strictly legally speaking, if the permission for re-use cannot be obtained, the re-use should be withheld, and potentially beneficial uses are hindered.

It may be clear that having to trace a copyright owner is a time-consuming process for the archival practice and not possible at the level of *DE OVERVAL* for every title. The relation between the steps that have to be taken in order to trace someone and the actual benefit of that process, making the material available so it can “reach its potential for film history making” (Jones, 2012, p. 119), is unbalanced. In as much as the availability of materials to view shapes our understanding of cinema's past, and

³ EYE Film Institute Netherlands has never had any cases in which untraceable copyright owners have come forward after a film has been made public. This information was provided by Ronny Temme (Head of Sales, EYE) in an email on 10 May 2010.

arguably our sense of history in a wider context, the chapter argues that a resituating of the debate is needed and highlights how the orphan works problem in the context of a film archive is not to be understood as the effect of a specific legal discourse exclusively but as part of a more complex issue, the relation between the film archive, copyright and film historiography.

3.1 Definitions and Limitations

The chapter will specify the varying definitions of orphan works, as well as the scope, the content, underlying causes and currently proposed solutions to the orphan works problem, and will consider why these works are a problem. However, the existing literature poses a particular shortcoming in that it is concerned with defining the subject⁴ and scope of the problem as well as its legal solutions, but does not address the implications that copyright ownership has for access, publication, dissemination and understanding of heritage materials.

There are two different, not entirely compatible, definitions of an orphan work. An immediate consequence of the differences between them is that the ‘orphan works problem’ is hard to demarcate and define precisely, and therefore hard to ‘solve’.⁵ The first is a strictly legal definition. In an article in which he addresses audiovisual archives and their inability to clear rights in orphan works for re-use, intellectual property scholar Stef van Gompel defines an orphan work as “a copyright protected work (or subject matter protected by related rights), the right owner(s) of which cannot be identified or located by someone who wants to make use of the work in a manner that requires the right owner’s consent” (2007, p. 2).⁶ In a later article,

⁴ The research literature seems to suggest a shift in the definition of an orphan work over the last few years from a work that *is* in copyright to a work that *might* be. Over the last few years, the nuance of the additional research that needs to be done seems to have made its way into the definition (Bainbridge, 2012).

⁵ For a more elaborate discussion of the history of the use of the term orphan itself in the context of film preservation, refer to Streible, D. (2009) ‘The State of the Orphan Films, Editor’s Introduction’, *The Moving Image*, 9(1), pp. vi–xix. Penelope Houston states in *Keepers of the Frame* (1994, p. 159): “Michelle Aubert described the CNC Archive as ‘a home for orphans, for films which have lost their proprietors’, which conveys a pleasing sense of a sort of Battersea Dogs’ Home for the cinema. Jan-Christopher Horak also used the expression ‘orphan cinema’ of the Eastman House collection, but in a very different sense. His orphans were the films which he thought stood most risk of being neglected elsewhere: B pictures, small-scale independent films, the work of the East Coast independent filmmakers of the 1960s and 70s, including documentaries.”

⁶ This is a variation on the 2006 *Report on Orphan Works*, in which the United States Copyright Office defines orphan works as “a term used to describe the situation where the owner of a copyrighted work

Van Gompel expands on this by stating that being unable to acquire permission from the right owner(s) makes it “impossible to reutilise the work legally” (2007, p. 670). The *situation* in which this occurs, which hints at the *practical* nature of the problem, is generally seen as the *orphan works problem*.

A second definition of an orphan work, according to film professor and Orphan Film Symposium⁷ founder Dan Streible, includes

... the curatorial and intellectual energy associated with the phenomenon. Orphan films can be conceived as all types of neglected cinema. While a film might not be literally abandoned by its owner, if it is unseen or not part of the universe of knowledge about moving images, it is essentially orphaned. Its orphan-ness might be material, conceptual, or both. Physical deterioration obviously puts films at risk. In this sense, more moving image works are orphaned—or headed to the orphanage—than not. But even a preserved and well-stored film is orphan-like if its existence is unknown outside of the archive. (2009, p. x)

As opposed to the legal definition, the more conceptual definition of an orphan work—works that lack “commercial potential to pay for their continued preservation” (Melville and Simmon, 1993, p. xi); basically all films outside of the commercial mainstream—does include those works in the public domain.⁸ In the context of this thesis, orphan works will be understood in the legal context. Although both orphan and public domain works can be largely seen as marginalised and neglected films that lack commercial potential, throughout this thesis, the two categories will be seen as separate. As the next chapter will show, the category of public domain works, a category that should not pose any legal restrictions, needs to be seen as a separate category with its own particular problems in the light of the copyright ownership and

cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner” (p. 1).

⁷ A biannual Film Symposium that stimulates presentations about preserving, studying and re-using orphan works, for more information see: <http://www.nyu.edu/orphanfilm/>.

⁸ At its most polemical, it has been argued that due to the lack of commercial potential for further preservation, all analogue films can be seen as orphan works in a digital context (Cherchi Usai, 2009).

archival access debate. An initial narrow focus on the legal status of orphan works, and a consequent separation of orphan works and public domain ones, will allow for the unpacking of a larger network of archival access factors, in which human agency and contemporary economics play an underrepresented and neglected role.

What both definitions have in common, however, is that they highlight that as a category, orphan works are not fixed. Their ‘orphanhood’, whether defined by copyright ownership or commercial potential, can be lost or gained relatively easily. A film loses its orphan status as soon as a copyright owner is identified and/or located. Alternatively, a work can also *become* orphaned once there is no more commercial incentive for its continuing preservation. An immediate consequence is that the orphan works problem cannot be described comprehensively, and a problem that is hard to define is arguably a problem that is difficult to regulate.

A re-cataloguing of film archival holdings according to copyright ownership (see p. 38) exposes orphan works as the ones that raise the most particular problems in the digitisation and archival access debate. When a work is assumed to be under copyright and the copyright owner of a work cannot be identified or located, permission for duplication and dissemination cannot be obtained. Orphan works cannot be used without this permission and collections often remain dormant. In the context of audiovisual archives, the works most at risk are documentaries, commercials, newsreels and educational films, in all cases particularly those from before the Second World War, as well as commercially produced films by production companies which have subsequently gone out of business or have transferred their rights to another entity (NFPP, 2004; HLG, 2008).

Particular obstacles to successfully identifying and locating the copyright owner have been identified by the United States Copyright Office in their large-scale orphan works study *Report on Orphan Works* (2006) as including

- (1) inadequate identifying information on a copy of the work itself;
- (2) inadequate information about copyright ownership because of a change of ownership or a change in the circumstances of the owner;
- (3) limitations of existing copyright ownership information sources;
- and (4) difficulties researching copyright information. (USCO, 2006, p. 2)

The report concluded that the “orphan works problem is real” while at the same time “elusive to quantify and describe comprehensively” (USCO, 2006, p. 7). A follow-up publication in 2012, on orphan works and mass digitisation particularly, added that the problem of orphan works “affects a broad cross-section of stakeholders including members of the general public, archives, publishers and filmmakers” (Pallante, 2012 (b), p. 64555).

Differences in interpretation of what constitutes an orphan work (and for instance the concept of ‘untraceability’) and estimations of the dimension of the orphan works problem (including those beyond the specific constraints of the audiovisual archive) have ranged from ‘40% of all holdings’ at the British Library to 58% at Cornell University library (Elferink and Ringnalda, 2008, p. 25). Recent estimates by several European audiovisual archives range from 5% to 21% of all holdings⁹. Not being able to gauge the problem precisely has direct consequences for the daily archival practice: in terms of access to the work, potential creative and productive use of the work will be delayed and possibly halted as long as the legal status of the work is unclear. On a larger scale, access to orphan works seems to call

⁹ Numbers expressed by representatives of EYE Film Institute and the Danish Film Institute at the EFG ‘Taking Care of Orphan Works’ conference in May 2011 in Amsterdam.

attention to the tense relationship between the film archive and the potential for film history writing of its holdings. It has been estimated that no more than 10% of the worldwide silent film production survives in archives today (Cherchi Usai 1996; Hediger, 2005; Horak, 2007), the amount of material that forms the basis of our entire understanding of that period of film history.¹⁰ In a time in which ‘ubiquitous access’ seems to be the norm, the estimates by audiovisual archives of how many film works are currently ‘dormant’ because of copyright restrictions could in the worst case correspond to roughly the same amount, and the consequences for film historiography seem self-evident.

The orphan works problem is not new. There have been copyright owners that were untraceable or impossible to contact much further back in time than the recent study of the phenomenon suggests. However, in the light of burgeoning digitisation discussions, and aggregated initiatives that promote access to cultural heritage and public archives whose funding applications often stress the necessity for (online) dissemination, the problem has come into focus rather quickly in the last decade.

¹⁰ In his article ‘The Gap Between 1 and 0’, Horak adds that “we know about as much about silent cinema as we do about ancient Greek pottery” (2007, p. 29). Slightly more optimistic numbers still only estimate a survival rate of 25% (Hediger, 2005) to “probably less than 20 per cent of those thought to have been made” (Cherchi Usai, 1996).

3.2 Scope, Content and Causes of the Orphan Works Problem

Before turning to some of the underlying causes of the orphan works problem, it is important to briefly look at the scope and content of the material under scrutiny as the problem is not only difficult to define but also hard to quantify. The large majority of films that are considered to be orphan will be found in public archives. Films housed by commercial archives, such as studio archives, will most likely have clear legal ownership, and such collections will therefore include few or no ‘true’ orphan works. However, some of the rights to the underlying works of film, such as a play or a novel, might belong to an external party and the costs for renewal of those underlying rights can be prohibitive to the extent that the work, although physically available, might be considered to be legally ‘lost’ *within* the archive (Allen, 2010).

The category of orphan works, both within the context of a film archive, as well as extending beyond that specific confinement, is hard to quantify precisely. There are certain kinds of film which seem to be at more risk of becoming orphaned than others: “newsreels, regional documentaries, avant-garde and independent productions, silent-era films, amateur works, and scientific and anthropological footage”; as estimated by the National Film Preservation Foundation (NFPF)¹¹ in their 2004 publication *The Film Preservation Guide*. Some archives have tried to come up with numerical estimations in order to illustrate the problem. In the context of the large-scale digitisation project ‘Images for the Future’¹², EYE Film Institute Netherlands started mapping the legal status of their film collections, with a specific

¹¹ The NFPF is a US non-profit set up specifically after the 1993 congressional hearings on film preservation in order to focus on preserving orphan films. In their 2004 publication *The Film Preservation Guide*, they adhere to an inclusive definition of orphan films that includes both the legal and the non-legal—films that “lack either clear copyright holders or commercial potential to pay for their continued preservation” (p. 3).

¹² Consortium partners included EYE Film Institute Netherlands, the Netherlands Institute for Sound and Vision, the National Archives and KnowledgeLand. For more information, see <http://imagesforthefuture.com/en/>.

focus on orphan works. In her presentation during the European Film Gateway conference ‘Taking Care of Orphan Works’ in Amsterdam in May 2011, Legal Counsel to EYE Géraldine Vooren illustrated that out of the 40.000 film titles in their collection, some 1800 titles were identified as orphan films at the time of speaking. She also listed, in descending order, the specific reasons why the works in question were considered orphan: unknown authors (this applied mostly to documentaries, amateur film and newsreels); lack of identified heirs; respective production companies ceased to exist; and identified but untraceable authors. In this one national example, it means that roughly 5% of the entire film collection can be considered orphaned. The number is a rather optimistic indication of one particular archive compared to an estimate made by a representative of the Danish Film Institute at the same conference, who assessed that some 21% of all films in European film archives are orphan film titles. Even the most optimistic estimates of what is left of silent film production is around 20 to 25% with far-reaching historiographic consequences, so these numbers could be alarming.

Legal Causes

The legal and administrative causes that underlie the orphan works problem forge a larger network of factors none of which individually can be seen as the sole reason for the challenges faced by archivists but taken as a whole create an untenable situation. Arguably, the most important legal causes of orphan works are threefold: 1) the term of copyright lasts a long time, which does not only mean it will take a long time before a work will enter the public domain, so that it can be reused without permission, but also that the longer the term, the greater the chance that a copyright holder will go missing; 2) there is no complete record of whose is what, partially due to a lack of copyright registration formalities (when there once were such registration

formalities the record was not necessarily complete or correct either; however, it created a clearer place to start a search); and 3) for a film there are many possible copyright owners, differing from country to country, making a search more complicated.

(1) Copyright Term Extension

The copyright term has been extended several times over the last few decades, both in the US and the EU, and works are currently in copyright for the longest amount of time since the inception of copyright legislation (Lessig, 2001). Law Professor Lawrence Lessig is one of the most prolific protagonists of the so-called free culture movement, a movement that is against extending the copyright term and advocates for returning to a much shorter term.¹³ He has explained in a series of publications that as a consequence of an extended (and revived) copyright protection term a whole generation of works got locked down as fewer works can be seen to enter the public domain, where they unrestrictedly can be re-used (Lessig, 2001; 2004; 2008). Direct consequence for the archival practice is that much clarifying information will be hard to trace and will entail a substantial amount of ‘detective’ work, particularly in the context of older works.

In the European Union, as a consequence of the *Copyright Duration Directive* (93/98/EEC),¹⁴ the copyright protection term was extended from ‘life of the author plus 50 years’ to ‘life of the author plus 70 years’ in 1995. In the US, where the

¹³ In an op-ed piece in the *New York Times* of 20 May 2008 entitled ‘Little Orphan Artworks’, Lessig described his proposed solution as follows: “Following the model of patent law, Congress should require a copyright owner to register a work after an initial and generous term of automatic and full protection. For 14 years, a copyright owner would need to do nothing to receive the full protection of copyright law. But after 14 years, to receive full protection, the owner would have to take the minimal step of registering the work with an approved, privately managed and competitive registry, and of paying the copyright office \$1.”

¹⁴ (The Copyright Duration Directive) Directive harmonizing the term of protection of copyright and certain related rights, 93/98/EEC.

*Copyright Term Extension Act*¹⁵ was responsible for the term extension in 1998, only the protection of a work that was already under copyright was extended. In EU member states, it was also the protection of a work of which the copyright had already expired, that was revived. The next chapter will deal with the subject of public domain works in more detail, but a large number of works, which either were already in or would soon enter into the public domain, were then re-copyrighted and less works were freely available to build upon than before. In his seminal book *Free Culture* (2004) Lessig explains some of the restricting consequences of the term extension:

It is valuable copyrights that are responsible for terms being extended. Mickey Mouse and “Rhapsody in Blue.” These works are too valuable for copyright owners to ignore. But the real harm to our society from copyright extensions is not that Mickey Mouse remains Disney’s. Forget Mickey Mouse. Forget Robert Frost. Forget all the works from the 1920s and 1930s that have continuing commercial value. The real harm of term extension comes not from these famous works. The real harm is to the works that are not famous, not commercially exploited, and no longer available as a result. [...] of all the creative work produced by humans everywhere, a tiny fraction has continuing commercial value. For that tiny fraction, the copyright is a crucially important legal device. For that tiny fraction, the copyright creates incentives to produce and distribute the creative work. (Lessig, 2004, p. 221–225)

In the context of a film archive, more works in copyright creates a need to trace more owners to ask for permission to re-use their works. This is a time-consuming and costly process and will not necessarily be successful, as demonstrated in the example at the beginning of the chapter. Strictly legally speaking, exploitation of the work should then be withheld, since legal re-use is impossible. The owner might not even be aware of their ownership and might not have minded the use. Subsequently, the potential user of the material has two choices: to go ahead with the

¹⁵ Copyright Term Extension Act 1998, 17 USC §§ 108, 203, 301-304.

project regardless and re-use the work (and bear the risk of an infringement claim) or to completely abandon the intention to use the work thereby hindering its productive and beneficial uses.

(2) Lack of Technical Registration Formalities

Copyright is currently considered to be automatic: “Copyright in any given work we know comes into existence from the point of creation” (Deazley, 2006, p. 102), but there once were registration formalities involved in obtaining copyright in a work. A lack of legal registration formalities can sometimes have far-reaching consequences in the archival practice. Different countries knew different kinds of formalities, and could include such steps as having to affix a copyright notice to the work itself. A consequence of not having the obligation to do so anymore can be that the lack of identifying information on the face of the work itself means that archival staff cannot even *begin* a search for potential owners. Registration formalities would not necessarily lead to conclusive ownership information later on in an artwork’s life cycle, it would, however, provide an easier point to start tracking it.

It leads from copyright registration being unnecessary that it will be very difficult to compose a list of the entire landscape of creative works. Until the late 1970s in the US for instance, obtaining copyright involved registration and deposit formalities and the central registry for copyright could be consulted for information, but there is no such legal obligation anymore¹⁶. Legal deposit could be seen as a

¹⁶ “Depending on the jurisdiction, this included depositing a copy of their work at a public library, fixing a copyright notice on the work, and renewing copyright status after a certain period of time. For instance, the first copyright Act, the Statute of Anne, set registration of the works at the Stationer’s Hall before publication as a prerequisite of protection. ... Formalities as a requirement for protection were abolished with the 1908 Berlin revision of the Berne Convention and were in turn gradually eliminated in all the signatory countries. ... This has resulted, in many cases, in a lack of sufficient or adequate identifying information. Because of the elimination of formalities, the number of orphan works

comparable obligation, but there are only a few countries that have a legal deposit system in place for audio-visual works, such as Denmark and France.¹⁷ A possible consequence of having to deposit a copy of a work in a central location, most often a designated national archive, could be that the respective countries do not have an orphan works problem. This seems to be, paradoxically, not the case: having to register works initially, does not necessarily lead to clear ownership later, as presented by a representative of the Danish Film Archive at the ‘Taking Care of Orphan Works’ conference.¹⁸ For a plethora of reasons, registration formalities have not and do not necessarily lead to a complete and up to date record of legal metadata and as will be addressed later, initiatives to bring back registration formalities can only be done on a voluntary basis.

(3) Multiple Rights Owners

A film tends to have multiple rights owners, which complicates the process of searching for them. In the UK, for instance, the copyright in a film

... expires at the end of the period of 70 years from the end of the calendar year during which the death of the last to die of the following occurs: the principal director, the author of the screenplay; the author of the dialogue, or; the composer of music specially created for and used with the film.
(Bainbridge, 2008, p. 68)

has increased, most notably because some works may not bear a signature or other imprint of the author’s identity”. (Borghi and Karapapa, 2013, pp. 73–74)

¹⁷ “[S]tructured and organised deposit of cinematographic elements exists in almost all MS [Member States]. These take the form of legal deposit (in 11 MS) or of compulsory, contractually-bound deposit for publicly funded films (in 16 MS). Only the Netherlands and the UK rely almost exclusively on voluntary deposit (UK has an exception for the films co-financed with Lottery funds). Very few countries, such as France, require the deposit of all movies distributed in the country” (DAEFH, 2011, p. 48).

¹⁸ This is not to say that legal deposit could not or would not help towards a more complete picture of legal metadata, but not only would there always be gaps, because of changes in the national law, for instance, but legal deposit also appears to have far reaching practical consequences for the quality of the work deposited. It would not be a desirable situation if the future source of a high quality restoration would have to be a second or third generation copy of the work that has been deposited in an archive to comply with legal formalities.

What follows from this information is that if any of these persons died before 1944 (at the time of this writing), the said film will be in the public domain. If any of these people died after 1944, the film is in copyright. If there is no information available on any of them, such as a date of death, the film *might* be protected. The more individuals determine whether a film is still in copyright, the more research will have to be done to determine a film's current status. As films usually have multiple potential rights owners, this work can therefore be quite substantial for the archival practice.

Copyright term extension, lack of registration formalities and multiple copyright owners are only some of the underlying legal causes of the orphan works problem, and as the underlying legal system constantly evolves and expands, the individual causes are not easily reversed. Some of these causes seem to have direct consequences for the archival practice, but that practice also harbours its own set of, more administrative, causes to the orphan works problem.

Administrative Causes

The legal causes of the orphan works problem are supplemented by a set of more administrative causes, such as 1) unclear archival origins of (parts of) an archive's collection; 2) lack of identifying information on the works themselves; and 3) a lack of manpower and financial infrastructure to do the necessary research on a title-by-title basis which might lead to a backlog in cataloguing.

(1) Unclear Archival Origins

The origins of archival collections are not always equally clear. This has immediate implications for locating copyright holders. National archives are often large institutions that safeguard a substantial part of a country's audiovisual heritage.

Donations or deposits to these archives can be large parties and the origins of large, notably older, parts of these collections will be unclear. Therefore, if there is a need to, it will not be easy to identify or locate all rights holders. Broadcasting archives usually safeguard a selection of radio and/or television programmes (older television material can also be film holdings) and sometimes they operate under the auspices of a broadcasting company. Regional and local archives generally adhere to a more or less thematic approach. In terms of the status of their legal metadata, most non-profit archives will find themselves in a comparable situation.

(2) Lack of Identifying Information

Partially created by the legal cause of the lack of registration formalities, even basic information about a work, such as the names of potential creators might be missing (in additional documents as well as on the work itself). Lack of identifying information makes even the start of a search for potential owners very difficult. When it is possible to start a search, because for instance the name of the original production company is known, it might turn out that it ceased to exist and that it is unclear what subsequently happened with the property, both material and intellectual. In the case in which names *are* known, it may very well be possible that the contact information is no longer up-to-date.

(3) Insufficient Manpower and Financial Infrastructure

Donations or deposits to archives can be large parties and often there is not enough manpower to immediately identify and catalogue the material correctly. The potential backlog has consequences for trying to track down rights holders at a later stage. At the height of the large national digitisation project in the Netherlands ‘Images for the Future’, the legal team of the EYE Film Institute Netherlands comprised of four staff

members.¹⁹ Tracing copyright holders on a daily basis with a team of people has not coincidentally led to one of the lowest international estimated percentages of orphan works.

The legal and administrative causes that underlie the orphan works problem work together in a larger network that can individually not be seen as the sole reason for the occurrence of the situation. Some of the underlying causes of the orphan works problem identified as legal can have far-reaching consequences for the work that needs to be done later in the archival practice. These are exacerbated by administrative and managerial reasons originating in the archival practice itself. Consequence is that the legal metadata record of a film archive is not complete, which makes it difficult to trace rights holders and as a result, the distribution of audiovisual archival material gets significantly delayed or held off indefinitely. As argued by van Gompel and Hugenholtz (2010), the orphan works problem can be seen as an information problem; on an informational level the problem need not exist and when it does, it need not progress as long as there is enough manpower and financial infrastructure available to do the necessary research. In general, however, it seems that works with ‘copyright issues’ have a tendency to disappear to the bottom of the list of works to be preserved, especially if there is a funding obligation to make the work (digitally) available.

¹⁹ Information provided by Leontien Bout (Legal Counsel EYE) in phone conversation on 13 March 2014.

3.3 Existing and Proposed Solutions

Legal research and resulting literature suggests that a “legal solution is required” for the orphan works problem (Elferink and Ringnalda, 2008, p. 6). This would take such forms as collective licensing schemes, contractual agreements or statutory exemptions, as administrative solutions alone cannot legitimise the re-use of a work. The legal solutions would have to be focused on bringing rights holders and (good faith) users together so that a transaction, most often in relation to a dormant collection, could take place. Several legal amendments are in the process of being implemented, but there is as of yet no ‘ready-made’ solution to the orphan works problem. The administrative solutions seem to be mainly directed at keeping collections workable and manageable on a daily basis, so solutions include such measures as risk assessments based on the history of the use of the material. Again, legal and administrative measures go hand-in-hand, and are collectively part of a more complex network of factors.

The context in which orphan works literature emerged has changed considerably in the decade or so since the topic first came to significance in archival access debates. The focus has shifted away from licensing uses of individual orphan works to issues of mass digitisation. Not only has the context in which the literature emerged changed, but the content of the studies has also changed. Over the course of the last decade the focus of the literature on orphan works has shifted from international and comparative survey/overview works that identified and tried to map the problem, including underlying causes to the problem and the realisation that a diligent search for a rights owner was necessary to reduce the number of orphan works, to studies that lay out the particular necessities of possible solutions to the orphan works problem, partially reformulated in the light of mass digitisation efforts

(Duke Center for the Study of the Public Domain, 2005; USCO, 2006; IViR, 2006; Elferink and Ringnalda, 2008; Vetulani, 2008; Pallante, 2012 (a)). There has also been a shift in authors, as representatives from the archival practice (heritage institutions and libraries, but also collective rights agencies, etc.) have become involved in thinking about shaping some of the legal initiatives, such as helping to establish due diligence guidelines or databases of legal metadata on the basis of a voluntary registration scheme (HLG, 2008; EFG, 2009; JISC, 2009).

Legislative Measures

A legal solution to regulate the use of orphan works is not simple as it has to address the range of the issues at stake: a comprehensive orphan works definition; the development of adequate due diligence guidelines (as well as the establishment of a regulating body); the kind of permitted uses (educational, commercial, etc.), which ideally should apply to all uses and all users, be in accordance with previous directives and international conventions, all in an international framework with different legal traditions²⁰; and remuneration schemes with precisely defined moments of payment, be it at the time of actual re-use of the material or at the time of the rights owner's potential claim. In what follows, a brief overview will be given of existing and proposed legislation.²¹

The UK has seen two large national copyright reviews, both of which included some focus on orphan works. The first was the *Gowers Review of Intellectual*

²⁰ “In the EU, it is a prerequisite that all member States have solutions, which are interoperable and agree to mutually recognise any mechanism that fulfils the generally accepted core principles. Mutual recognition is important with a view to the cross-border nature of the use” (HLG, 2008, p. 5).

²¹ For an extensive discussion of possible solutions to the orphan works problem as well as the advantages and disadvantages of each leading up to the current state, see Van Gompel and Hugenholtz, 2010.

Property in 2006²², but it wasn't until the *Hargreaves Review of Intellectual Property and Growth* in 2011 that a recommendation on orphan works was given:

The problem of orphan works - works to which access is effectively barred because the copyright holder cannot be traced - represents the starkest failure of the copyright framework to adapt. The copyright system is locking away millions of works in this category. ... The Government should legislate to enable licensing of orphan works. This should establish extended collective licensing for mass licensing of orphan works, and a clearance procedure for use of individual works. In both cases, a work should only be treated as an orphan if it cannot be found by search of the databases involved in the proposed Digital Copyright Exchange. (Hargreaves, 2011, p. 38–40)

In a notice of inquiry of late 2012, in which the U.S. Copyright Office seeks comments regarding the current state of play for orphan works, Maria Pallante, Register of Copyrights and Director of the U.S. Copyright Office, addresses the present state of orphan works legislation in the U.S. Because of the issues involved with these works in the context of mass digitisation efforts (in various kinds of heritage institutions, such as audiovisual archives, libraries and galleries), there is an on-going focus on orphan works in the U.S. and “[b]oth the 109th and the 110th Congresses considered the orphan works problem. [...] Congress came very close to adopting a consensus bill shortly before the presidential election in 2008, but did not enact orphan works legislation before adjourning” (Pallante, 2012 (b), p. 64556).

In October 2013 the EU Orphan Works Directive²³ was adopted (Vooren, 2014) and had to be transposed into national law by Member States before 29th October 2014. At the time of this writing not all Member States had done so (Rosati,

²² The *Gowers Review of Intellectual Property*, a study commissioned by the British government to review a proposal to extend the term of copyright protection from 50 years to 95 years (both retroactively and prospectively), concluded that such an extension was not supported by economic analysis. The study noted: “In a system where all works receive maximum protection for the maximum term, the vast majority of works remain in copyright despite not being economically viable for the rights holder” (LoC, National Recording Preservation Board, 2010, p. 116).

²³ “Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works”.

2014). Several countries, such as Canada, France, Hungary, Denmark and Finland, already have adopted forms of orphan works solutions in national law. The Canadian Copyright Act, for instance, “permits users to file applications with the Copyright Board of Canada for the use of certain types of orphan works on a case-by-case basis. If an applicant demonstrates that it has made a reasonable effort to locate the rights holder and the rights holder cannot be located, the Board will approve the request and issue a conditional non-exclusive license” (Pallante, 2012 (b), p. 64560)²⁴.

Existing legislation is currently undergoing changes that drastically alter the way in which Film Heritage Institutions can make use of orphan works. For the time being it concerns an exception to copyright law for cultural and heritage organisations, which allows for digitisation and making available online of orphan works for non-commercial purposes after a diligent search. In the UK, for instance, an orphan works register can be consulted to determine whether a previous diligent search has been made and whether that search might still be valid (IPO, 2014). Obvious obstacles remain that a diligent search may be prohibitive, especially for large numbers of works and that the re-use is limited to non-commercial use only.

Administrative Measures

One of the most practical solutions to deal with the orphan works problem is to put a large legal staff into place who research the historic and current legal status of the archival holdings including up-to-date contact information of the current rights owner so that a transaction can take place between a good faith user and the rights owner. In principle, the problem need not exist, but obviously, clearance of rights, in particular

²⁴ For a fuller discussion of the already adopted forms of orphan works solutions in several national laws, see Pallante, M. (2012) (b) ‘Orphan Works and Mass Digitization’, *Federal Register*, 77(204), Washington, DC: Library of Congress, Copyright Office, pp. 64555–64561.

in large collections, may not always be possible at the level of each unique item. Long-term solutions to the orphan works problem are being sought in regulating it legally. However, it is difficult to implement the various solutions in an official, and more importantly, an international context, as digital access, and more specifically online distribution of a work is by definition international. Some of the obvious solutions would not comply with international agreements; while “it does not further the objectives of the copyright system to deny use of the work, sometimes for decades. ... [I]t is not good policy to protect a copyright when there is no evidence of a copyright owner” (Pallante, 2012 (a), p. 1). Putting a research team at work is a time-consuming and costly process and will not always be a successful strategy as seen in the example of DE OVERVAL. When the permission needed for duplication and dissemination cannot be obtained the archive will have to determine what the risks are of making work available based on the history of the work despite failing to answer the copyright ownership question. Sometimes that risk will be taken, however, in other cases, it will not.

In practice, trying to identify and locate a copyright owner can be a time-consuming process. In the framework of the European Digital Libraries Initiative, which aims to “provide a common multi-lingual access point to Europe’s cultural heritage”, a workgroup at the EU-level compiled of representatives of right holders and cultural institutions, such as ACE (Association des Cinémathèques Européennes), FIAPF (Fédération Internationale des Associations de Producteurs Films), FERA (Federation of European Film Directors) as well as the British Library, the British Screen Advisory Council and many other representative agencies have proposed a *Memorandum of Understanding on Diligent Search Guidelines for Orphan Works* in 2008. Due diligence guidelines include such factors as who must participate in the

search process; the nature and extent of the search required and the types of resources, tools, registries or other information sharing mechanisms required or allowed in completing a search (Hansen, Hinze and Urban, 2013). The Memorandum has been recognised in the orphan works directive.

Various kinds of copyright registries, based on voluntary registration, feature in both legislative and administrative measures. In practice, a great quantity of legal metadata is missing and the orphan works problem can therefore be seen as an information problem. Partially, this is due to the lack of copyright registration formalities (van Gompel and Hugenholtz, 2010), so one of the most obvious solutions would be to reinstate copyright registration formalities. However,

... except for purely national situations, it is prohibited under the Berne Convention to establish mandatory registration systems or to mandate a copyright notice, including information on the identity and whereabouts of a copyright owner and the date of copyright, on each copy of the work. On the other hand, it is not prohibited to establish measures that stimulate rights owners to voluntarily provide information concerning copyright ownership and licensing conditions (van Gompel and Hugenholtz, 2010, p. 4).

The obvious drawback of a database with voluntary registration for the orphan works problem—a so-called *opt-in* scenario—is that rights holders who sign up to these databases will most likely be aware of their property.²⁵ An obvious part of the orphan works problem is that some of the rights holders might be missing or ignorant

²⁵ Although both primarily geared towards the literary world, some examples of databases based on voluntary registration are ARROW and WATCH. ARROW, the acronym for Accessible Registries of Rights Information and Orphan Works towards Europeana, was a project of a consortium of European national libraries, publishers and collective management organisations, also representing writers – working through their main European associations and a number of national organisations – which was launched in November 2008 and lasted for 30 months; <http://www.arrow-net.eu/faq/what-arrow.html> (last accessed: 11 May 2013). WATCH is a database of copyright contacts for writers, artists, and prominent people in other creative fields. It is a joint project of the Harry Ransom Center (The University of Texas at Austin) and University of Reading Library in the UK. Founded in 1994 as a resource principally for copyright questions about literary manuscripts held in the US and the UK, it has grown into one of the largest databases of copyright holders in the world; <http://norman.hrc.utexas.edu/watch/about.cfm> (last accessed: 11 May 2013).

of their rights, so a database with voluntary registration does not seem to be an exhaustive resolution. A more productive resolution is an orphan works registry as part of the Directive's implementations, which can be consulted to see whether another user has previously completed a diligent search. It is a different kind of database; it is not based on voluntary registration by rights holders but consists of information provided by users who previously have wanted to use the same material²⁶.

²⁶ Another recent initiative is FORWARD, coordinated by the Cinémathèque royale de Belgique and co-funded by the Community programme ICT-PSP: "Since November 2013, a consortium of 13 partners, among them 11 Film Heritage Institutions and commercial film libraries are working on FORWARD, a three-year EU funded project, which aims at creating an EU wide, semi-automated system to assess the rights status for all types of audiovisual works, including orphans. FORWARD has been initiated by ACE in the context of the Orphan Works Directive 2012/28/EU"; <http://www.ace-film.eu/?p=3456> (last accessed: 15 November 2014).

Conclusions

In this chapter, the definition, scope and the underlying causes, as well as some of the proposed solutions to the orphan works problem have been highlighted and a case study showed how an unsuccessful search for copyright owners can significantly delay the distribution of archival film. Indifference of the film industry to the survival of its past product, neglect, loss, decay or wilful destruction and other political, economical and curatorial issues are amongst the factors that have helped shape the particular partial picture of the available archival film to be studied. Copyright ownership might be added to the line of historic and contemporary factors that influence what material is available and consequently its potential for film history writing.

Aside from the principal objectives of acquisition and preservation, the remit of a film archive is to provide access to their holdings. If a film archive cannot provide access to their holdings, it cannot engage with the larger dynamics of history, in the sense that there is an inhibited visibility of important works of film that are arguably crucial to our understanding of the past. In the context of this chapter, the archive can be seen as a mere warehouse for absent rights holders. Copyright can have a restrictive role for the archival film material's potential for film history making, as evidenced in this chapter. In the case of orphan works, copyright can also be seen to be restrictive in relation to the rights holders in terms of a lack of a potential remuneration, as in some cases they might not even be aware of their own rights. The unavailability or limited availability of archival material puts constraints and limitations on the construction of a certain kind of film history, which can be seen to be co-constructed by the institutions that safeguard the evidentiary products. The particular part of the archival fragmentation the chapter addresses is that in contrast to

the previous chapter in which the extant archival material was seen to be under embargo, potentially available but not accessible, in this chapter the archival film is extant, potentially available and *may be made* accessible, based on the decision of the archive to make the material accessible. As such, the archive can be seen as a temporary placeholder, as it can decide to create a further potential for the material.

In order to unravel some of the contemporary economics of archival access, the next chapter will focus on those works that should be free from legal restrictions, the films pertaining to quadrant 3 and 4, the public domain films.

4 A VEHICLE OF POWER

Introduction

The previous chapter focused on orphan films, which without a locatable or identifiable rights holder raise particular difficulties in the context of digitisation and archival access debates. This chapter will be dedicated to public domain films: films that should not pose any problems in mass digitisation projects, as they are films that should be free from legal restrictions and can be used without the need for permission for use from the copyright owner. By comparing the varying practices in which both for-profit and non-profit archives provide access to their public domain works, the chapter points out that a refocusing on the distinction between intellectual and material ownership is needed. A focus on material ownership will unravel some of the contemporary economics of archival access, such as exclusive ownership of source material and human agency. *BEYOND THE ROCKS* (US 1922, Sam Wood) will be used to illustrate that archival access is not only controlled by those who own the rights, but also by those who own the physical assets. Even when there is a lack of legal restrictions, the archive itself plays a role in the shaping of access practices as well as a particular potential for film history writing in deciding to make a film publicly accessible. The film archive can be seen as an active site of agency, power and resistance, as a ‘vehicle of power’. What access to orphan films in the previous chapter and to public domain films in this chapter helps to indicate is that one of the contingent elements of film history writing is the institution that controls the filmic products. The particular part of the fragmentation that is highlighted in this chapter is

that even when a part of the extant record is legally available, it is not necessarily publicly accessible; it has to be actively made available.

EYE Example: BEYOND THE ROCKS (US 1922, Sam Wood)

BEYOND THE ROCKS (US 1922, Sam Wood), the only film in which Gloria Swanson and Rudolph Valentino ever starred together was produced and distributed by Paramount Pictures in 1922. With a theatrical release in the US from before 1923, the film is therefore automatically considered to be a public domain film. For decades, the film was thought to be lost; even the studio did not have any film material anymore.

Approximately 80 years after its first release, the only known surviving film material was rediscovered in the Nederlands Filmmuseum. What was found over the course of several years in the Dutch archive was the Dutch release version of the film; a film copy with Dutch intertitles. During the film's (digital) restoration in 2005, in one of the restoration's versions¹, the Dutch intertitles were replaced by newly designed English ones, just like the original American release version had had based on the continuity script held at the Margaret Herrick library in Los Angeles (Fossati, 2009). A new tinting scheme was applied to the film and the title was provided with a newly composed musical score.

Paramount, as the original distributing studio did not help restore or re-release their film title. The restoration was carried out by the Nederlands Filmmuseum in collaboration with Haghefilm Conservation laboratories and financially supported by ING Real Estate (Fossati, 2009). The re-release on DVD was licensed to US distributor, Milestone Film & Video.² In the US, the film, *as a new, restored, version*,

¹ Other versions include a silent as well as a Dutch version with soundtrack (Fossati, 2009).

² EYE Film Institute Netherlands claims the theatrical as well as the DVD and television distribution rights of the film for the Benelux; licensed distributor Milestone Film & Video for all other countries

was registered for copyright at the Library of Congress, although the company's director acknowledged that this presented an "untested" legal construction that "would not necessarily hold up under court" (Doros, 2010).

Although neither Paramount nor its representatives have ever officially commented on their involvement in the restoration or the release of the film, in an interview in 2010 with Barry Allen, the by then retired Executive Director of Broadcast Services and Film Preservation of Paramount Pictures, shed some light on the general film preservation approach of the Hollywood studio:

Motion picture preservation depends on a solid copyright because of the huge costs it takes to maintain the preservation of a quality sound and picture image. The costs are enormous and copyright gives the incentive and the ability to recoup that kind of cost. ... Sometimes a film gets lost because the rights change hands and it goes into storage or it gets moved ... it goes into somebody's estate; you lose trails and sometimes you can't find stuff. That doesn't really apply to something that is perpetually owned by a studio. ... I can't think of anything [in the Paramount library] that's really important that might have slipped through. ... If there were copyright renewals still in place, I think they would be much more likely not to miss a renewal now, because I don't know of anybody who doesn't think there is something out there that hasn't any value at all, no matter how bad it is. You're probably going to be able to use it. (Allen, 2010)

A tentative conclusion from Allen's comments is that arguably, if *BEYOND THE ROCKS* had still been Paramount's, if it had still been in copyright, it would not have been 'lost'. However, this does not mean that it would have been publicly accessible; the studio might have decided not to distribute it at all if the necessary investment in the restoration of the title would not have been worth the potential profit. It was the public domain status of the film in combination with its exclusive elements re-surfacing in a public institution that led to the film being restored and re-released.

(Milestone Film & Video, 2005).

4.1 (Legally) Available Versus Publicly Accessible

In an article in which she addresses some of the detriments for both copyright holders and the public of not being able to clear moving image material for digital use due to copyright challenges, Sally McCausland, senior lawyer at Australian broadcaster SBS, addresses the “digital skew”, which she also terms the “blockbuster skew”:

The sense of history which comes with access to the whole, or a substantial part, of an archive, is of much greater cultural value than a small selection curated through the random prism of copyright clearance. ... There is a danger that in the digital age the publicly available cultural history ... will skew: we will remain familiar with ubiquitous blockbuster programs which are available ... more than we will remember local ... programs left in the archives. (McCausland, 2009, p. 160)

The digital skew—the asymmetry between analogue and digitised collections—has been attributed to the gridlock of copyright, ranging from the latter’s role in the selection of material for digitisation to making it publicly available (Hudson and Kenyon, 2007). Some categories of works can be considered ‘legally difficult’ indeed; they will not be (made a priority to be) digitised and made available and therefore seem to contribute extensively to this digital skew. As argued in the previous chapter, orphan works—works to which the copyright owner cannot be located or identified—pose particular difficulties for archives in large-scale digitisation projects. It seems, however, that also less obvious categories of works are at play in the digital skew. As a consequence of examining the accessibility of works that should be free from any legal restrictions—public domain works—it becomes apparent that even in that category the relation between what is potentially available in analogue form as opposed to its digital copy is skewed.

The re-cataloguing of audiovisual archival holdings according to copyright ownership distinguishes the public domain works as works that should be free from

rights restrictions as they can be used without the need for permission for use from the copyright owner (Deazley, 2006). New artistic works can be built on older, extant works and a large public domain, in which works are freely available, is generally accepted as a stimulant for further creativity. However, these works are, paradoxically, not necessarily publicly available: the works are often deposited behind archival institutional layers and archives do not necessarily have the possibility to release the work. A large group of scholarly legal publications that address (a call for a larger) public domain express concern for the unavailability of some of these public domain works behind archival administrative layers, but do not address the repercussions of such unavailability for the study of the materials (Lange, 1982; Litman, 1990; Samuelson, 2003; Lessig, 2004; 2006; 2008; Boyle, 2008). A focus on access to public domain works can be used to unravel some of the contemporary economics of archival access. What access to orphan and to public domain films will bring to light is that film history is contingent and one of the elements of contingency is the institution that controls the evidentiary film elements. By highlighting the varying practice in which both for-profit and non-profit archives provide access to their public domain works, this chapter reveals that the so-called digital skew is firmly positioned within a legal paradigm, but that a slight refocus on the distinction between intellectual and material ownership is needed. Intellectual access implies material access: availability and public accessibility is not only controlled by those who own the rights, but also by those who own the physical assets, with far-reaching consequences for the visibility of the films.

The public domain is often defined in terms of what it is *not*: it is seen as the opposite of copyright or as the “gummy residue left behind when all the good stuff has been covered by property law” (Boyle, 2008, p. 40). In *Rethinking Copyright*:

History, Language, Theory, using several steps to arrive at a legal cross-section of the intellectual commons, Law professor Ronan Deazley builds up the concept of public domain, and its rhetoric more specifically, in order to uncover some of the complexities associated with the concept, such as the notion of the “exclusive control of the physical holding” (2006, pp. 109-110). This concept proves an essential aspect when it comes to examining film archives: although public domain works can be used without the need for permission, it does not mean they are publicly accessible. Archives are therefore involved in what Deazley describes as the “significant opportunity for interplay between the ownership of the physical object, ... and the ability to control the subsequent use and dissemination of the work” (2006, p. 124). Not only those who control the rights control all access, but also those who control the physical holdings, perhaps especially after the rights have expired.

As Deazley (2006, p. 130) states: the “public domain ... is a historically, geographically, culturally, socially and politically contingent concept, as are all intellectual properties”. It is an under-researched part of intellectual property in the light of digitisation debates, which is surprising as all works will eventually end up in the public domain. The public domain can be seen as the “basis for our art, our science, and our self-understanding. It is the raw material from which we make new inventions and create new cultural works. ... The public domain is the place we quarry the building blocks of our culture. It is, in fact, the majority of our culture” (Boyle, 2008, pp. 39-41).

In what follows, three specific factors will be unpacked in order to highlight how they influence the digital distribution of public domain works in the context of the film archive: 1) the exclusive ownership of source material; 2) the exact legal status of a work (since this may vary from country to country); and 3) the financial

responsibility for their continued preservation. The public domain works, despite their lack of legal restrictions, and therefore potentially available for history making, will turn out to, paradoxically, also contribute to the digital skew, and not necessarily be publicly accessible.

4.2 Exclusive Ownership of Source Material

After works have fallen into the public domain and are no longer owned intellectually, what is left in the archives is the material property.³ There seem to be great differences in the ways in which different kinds of archives provide access to their public domain materials; commercial archives will often own the copyright to most of their holdings and will therefore frequently exploit those materials in favour of their public domain holdings, as will be illustrated by a studio archive example. Non-profit archives, on the other hand, own mostly material property and seldom the rights to the films they safeguard (Thompson, 2007), so for distribution purposes, they benefit from the rights to their works having expired. Whether they are commercial or non-commercial in nature, all audiovisual archives have become involved in what Deazley (2006, p. 124) in *Rethinking Copyright* has characterised as the “interplay between the ownership of the physical object ... and the ability to control the subsequent use and dissemination”.

Aside from the different philosophical shapes the public domain apparently can take based on what one believes is in or out of the public domain, there is also a distinction between what could be considered a ‘practical’ versus a ‘theoretical’ public domain. A theoretical public domain comprises works that are in the public domain in theory, but as Samuelson demonstrates, in practice do not really ‘reside there’: “A painting from the mid-nineteenth century that remains in a private collection or was destroyed in a fire is, in theory, in the public domain as a matter of

³ There are several ways in which works can become public domain. “Copyright in any given work we know comes into existence from the point of creation” (Deazley, 2006, p. 102) and one of the most straightforward ways in which a work is said to enter the public domain, is when that copyright expires. Alternatively, the copyright in a work might have been forfeited because of a failure to comply with the technical formalities of copyright in effect at the time or the works might be non-copyrightable at all because they are categorically excluded from copyright protection, such as some governmental works (Samuels, 1993).

copyright law, but its non-public nature or its destruction mean that it may, in fact, be there only in theory” (2003, p. 149; n12). Public domain works are subject to appropriation by anyone, as they can be used without the need for permission from a copyright holder, but exclusive ownership of the physical materials and a resultant control of the works’ dissemination seem to adversely influence this situation as they can be made less accessible. In this section it is argued that, just like a mid-nineteenth century painting that remains in a private collection, some of the public domain works held by film archives also reside only in a theoretical public domain. They do not reside in a practical public domain, because of their non-public nature combined with the archive’s exclusive ownership of the physical materials.

There is a relationship between the exclusive ownership of public domain material and its consequent availability and public accessibility that is worth unravelling. As highlighted at the beginning of this chapter, *BEYOND THE ROCKS* was a film title that had lapsed into the public domain and ultimately was preserved by a public institution that exclusively held the only film elements to the title available. In relation to some of the early *ALICE* titles produced by Disney, which are also in the public domain, film scholar Peter Decherney writes: “No commercial attraction can mean no restoration: Disney, for instance, showed no interest in a batch of early black and white cartoons found in the Dutch archive, leaving it to the Dutch to do the work” (2012, p. 127). Again, exclusive elements held by a public institution meant that the titles got preserved and were publicly accessible at all. Another example that is worth mentioning in the context of its public domain status is the Carole Lombard film *NOTHING SACRED* (US 1937, William A. Wellman) as presented by Disney’s Jayson Wall at the 2011 Association of Moving Image Archivist’s (AMIA) Archival Screening Night in Austin. This first screwball comedy shot in colour entered the

public domain in the US because of failure to renew the film's copyright registration. The film was shot in the expensive three-strip Technicolor process, but for several reasons, amongst which the degraded integrity of the original film elements (www.creativeplanetnetwork.com, 2012), the film has hardly ever been seen in that version. The film has also been in circulation in a black and white duplication. Recently, Disney invested a large sum of money in the 35mm Technicolor restoration from the original black and white nitrate separation camera negatives. However counter-intuitive, despite the film's public domain status, this version of the film is rarely seen. There are numerous cheaper (black and white and colour) versions available so the handling fee that needs to be paid for showing the Technicolor version, the way the film was shot, appears to be prohibitive. The studio owns the film's unique film elements; the title is potentially available but not very publicly accessible.

For-Profit Initiatives

The following two case studies show that when it comes to digital distribution in the for-profit environment, fewer public domain titles appear to be made available. As will be illustrated, in the case of an on-demand initiative of a studio archive, public domain titles are fading from public view, and in the case of a specific high-end DVD label, the works will not even be acquired for possible distribution.

(1) Warner Brothers Collection Online

The holdings of a studio fall into clearly distinguishable legal categories: they are either in copyright or they are not. In cases where they are, the studio will probably own the copyright to most of the works and therefore an upfront investment in the preservation and subsequent dissemination of the work can be made relatively easily.

In cases where the works are not under copyright anymore, the materials are said to be in the public domain, because the rights have expired, for instance, or because the rights have been forfeited because of legal technicalities⁴. For the studio, it will almost always be easier to recoup some of the preservation and access costs when a work is in copyright, so when it comes to providing digital access to the works online, commercial actors are most likely to invest time and money in such clearly copyrighted works, rather than in those works from which a commercial return is less easily secured. Not being able to control the potential infringement of a distributed public domain title seems to lessen the attraction of pursuing the digital or online dissemination of such a title.

In the case of online access to public domain works, it seems that the studio chooses to reduce their availability, as was illustrated by George Feltenstein⁵ during his presentation at the ‘Reimagining the Archive’ conference at UCLA in November 2010. While presenting Warner Brothers’ new DVD-on-demand website,⁶ he outlined that of the circa 7800 Warner feature films,⁷ some 4100 were distributed on VHS and in 2009, 1700 features had come out on DVD. The DVD-on-demand website was launched in March 2009, and what started with 150 digitised titles, had grown two years later to approximately 1000 titles, including “10% of the library that likely would not have made it to DVD before” (Feltenstein, 2010). An apparently new niche for archival material had been tapped into; the 1000 titles were not exclusively

⁴ For numerous classic studio film examples, see Pierce, 2007.

⁵ Senior Vice president, Theatrical Catalogue Marketing Warner Archive Collection Online.

⁶ What started as www.warnerarchive.com now redirects to www.wbshop.com, where other WB products are sold, such as clothing and toys. “The DVDs are created on demand, professionally authored, and ship within two or three days” [currently to the US only] (Feltenstein, 2010) (last accessed on 9 October 2012).

⁷ These titles are not exclusively Warner produced feature films: several mergers and take-overs have led to what is currently a quite eclectic film collection, including several other film libraries, such as the pre-1986 MGM one.

theatrical feature films that were released before; they also included ‘short subject collections’ previously not distributed. At the same time, however, while the ultimate goal is to ‘make the whole Warner library available to everyone with the best possible quality’ (Feltenstein, 2010), the site features hardly any public domain titles. The lack is most visible in the absence of films with a theatrical release date of before 1923,⁸ the cut-off date in the US before which all creative works are deemed public domain automatically. In the case of Warner Bros., this chapter suggests that in the shift from analogue to digital distribution, fewer public domain titles are being made available and are fading from public view.

(2) Criterion Collection

Another example in which titles that are still under ownership appear to be favoured over public domain titles is in the DVD distribution of the Criterion Collection. An immediate and important distinction with the previous example of Warner Bros. is that the Criterion Collection does not own a film collection as such, but is in the business of issuing DVDs of films (“film school in a box”; Parker and Parker, 2011), the licensing rights to which they have to acquire from an external party. In his role as advisor and consulting producer for Criterion, Robert Fischer affirmed in his presentation during the 2010 Gorizia International Film Studies Spring School that the label would never distribute public domain titles: of the various selection criteria, a “secure rights situation” is the very first, only then followed by whether the particular

⁸ More research would be needed not only to establish whether any of the later titles featured on the site are in the public domain (there are several ways in which a film can become public domain) but also to establish more precisely how many titles currently owned by WB were released pre-1923 and still survive. As Warner Brothers was officially incorporated in 1923, pre-1923 films would include such titles as produced by First National Films, which later merged with WB (Finler, 2003). Additionally, titles that can be purchased on the same website from both the MGM Limited Editions and Sony Pictures Choice Collection do also not include any pre-1930s titles.

title fits within the rest of the collection.⁹ This is not to say that Criterion does not encounter other rights problems: over the years it has become increasingly hard to obtain licensing rights to produce DVDs from popular studio films. ‘One unfortunate result of this situation is that many of the excellent supplements [that were] available on the company's laserdiscs languish without an outlet’ (Parker and Parker, 2011, p. 184, n72).

Although Warner Bros. currently seems to be making their material available in an interesting ‘hybrid’ situation between a push (“making available”) and a pull (“on-demand access”) model (Fossati and Verhoeff, 2007, p. 331), these are but two examples of large-scale digital access efforts in which little or no attention seems to be given to public domain titles. Selling attractive products with which some of the remastering and restoration costs can be recouped requires a clear copyright ownership or clear licensing agreements. An arguably more important result of a clear copyright ownership is the potential protection against possible infringement, so an upfront investment in said preservation costs could be made at all. There is, however, a big difference between the business model of a studio and the mandate to making works available of, for instance, a national audiovisual archive.

Initiatives by Non-Profits

The same possibilities concerning the legal status of the material apply to the holdings of a non-profit archive: the material is either in copyright or it is not. If the material is in copyright, it is possible that the archive itself is the owner of the films’ rights. This will most probably, however, only apply to a relatively small proportion of the

⁹ Obvious exception to the policy seems to be *NANOOK OF THE NORTH* (US 1922, Robert Flaherty), which was released on DVD by Criterion in 1999 (as #33). The title is a US film with a release date before 1923, the defining reason that makes the film a public domain title.

materials. Non-profit archives seldom own the rights to the material film holdings they own, so the bulk of the holdings of these kinds of archives will consist of material of which the owner is an external party. If the material is in the public domain, archives benefit from the rights to their works having expired, especially in terms of distribution purposes. However, just like in a for-profit environment, selections will have to be made as to what material will be made available. High costs are involved in the restoration, the digitisation and the continued preservation of film material, so even if a non-profit archive operates under a mandate that requires material must be made available, it will not blindly provide online access to all the holdings that they either own themselves or which are in the public domain. Not only the commercial archives, but also the public ones appear to be involved in the ‘interplay between the ownership of the physical object ... and the ability to control the subsequent use and dissemination’ (Deazley, 2006, p. 124).

(1) Internet Archive

Most of the online access provided by public archives appears to emphasise public domain works in favour of the more ‘difficult’ copyrighted works and some online initiatives seem to be made up in large part or even exclusively by public domain material. One example is the Internet Archive, a non-profit initiative established in the mid-1990s in San Francisco (<https://archive.org/about/>), which aside from open access to public domain books also provides online access to historical audiovisual collections, through collaboration with external partners, such as the Library of Congress. The site contains “only public-domain items, including the ever-popular DUCK AND COVER [a 1951 US children’s civil defence film], allowing ... to avoid the problem of copyright” (Thompson, 2007).

(2) Images for the Future Projects

Other examples of initiatives by non-profits include projects that have been developed as part of the Dutch national digitisation project ‘Images for the Future’¹⁰, such as video-on-demand platform *Ximon* and online remix contest *Celluloid Remix*. One of the ideas behind the video-on-demand portal Ximon was to avoid the legal status of the material dominating the character of the portal. However, the most important factor that determined what was presented online at first was, as former EYE curator Emjay Rechsteiner (2010 (b)) elucidated, “what was available and what was clearable” and therefore included a large proportion of public domain works. In order to determine what was available, various other factors, such as the physical condition of the material or how much restoration a film would need, were also taken into consideration¹¹. *Celluloid Remix*, an online remix contest with early Dutch films, which took place in 2009 for the first time, was made up exclusively of public domain material.

The consequences for film historiography, in terms of the material’s potential for history making, seem clear in the case of the accessibility of public domain works. In a commercial context, the public domain status of the films in combination with the exclusive ownership of the source materials leads to an invisibility of the materials. In a non-profit context, that same combination seems to facilitate an ‘easier’ online distribution and can even lead to what curator of the Danish Film Institute Thomas Christensen in his presentation at the ‘Archiving the Future’ conference in York, UK, in February 2010, labelled as a “freak show”: a unilateral representation of

¹⁰ Participating partners included large national film and television archives. For more information about these initiatives, see for example: beeldenvoordetoekomst.nl/en/activities/celluloid-remix.html (last accessed: 15 November 2014).

¹¹ In the absence of a further financial investor or strategic partner, Ximon has halted its services in January 2014; <http://www.ximon.nl/>.

audiovisual public domain materials on various online platforms, or a *hyper-visibility* of certain titles.

In what precedes, the section has tried to argue that sometimes public domain works must be seen as part of a so-called theoretical public domain, for the works are not practically available, whereas alternatively, they sometimes appear to be hyper visible, for they are the ‘easiest’ to re-use. If even a legally unrestricted category of works, such as public domain works, plays a role in the digital skew, it would reveal that the positioning of the digital skew exclusively within the legal paradigm neglects certain other economic factors of access.

4.3 Legal Status and Responsibility for Continued Preservation

Public domain works are relevant, in general and for cultural heritage institutions in particular, as a repository of ‘raw material’. The materials cannot only be built upon intellectually but can also be re-used materially, for instance, by artists who work with extant material. The real difficulty according to Law Professor James Boyle, is not to validate the public domain’s relevance—his own position is that the public domain is copyright’s very goal as opposed to its residue (Boyle, 2003)—but the real difficulty is defining the exact scope of the public domain. And as long as it is hard to define the exact scope, certain uses of the material will remain inhibited. The difficulty seems to have two components: firstly, it seems to be difficult to determine what is part of the public domain. Based on what one believes is in or out of the public domain, such as certain exceptions to re-use a work, Boyle argues “[t]here is not one public domain, but many” (2003, p. 62). And second, a work can still be under copyright in one country while in the public domain in another based on the different national rules applicable to protection or duration (Dusollier, 2010). In an article in which she tried to map this “uncharted terrain”, Law professor Pamela Samuelson (2003, p. 148) summarised the public domain as being “different sizes at different times and in different countries”. That variability can greatly complicate the task of identifying the composition of the public domain, as at any given moment it is very difficult to determine what exact holdings of an archive are in the public domain. For the online distribution of such works not to be halted, it seems important to be able to gauge the size or the exact composition of the public domain, since it entails making them available in many countries simultaneously.

In an article in which they analyse digitisation practices within Australian cultural institutions, Hudson and Kenyon (2007, pp. 199–200) conclude that:

“Copyright has had a significant impact on digitisation practices to date, including in the selection of material to digitise and the circumstances in which it is made publicly available ... and has driven the content of online exhibitions, galleries and databases”. It is probably safe to say that this conclusion applies to more countries than just Australia and that copyright appears to have driven online content in both for-profit and non-profit contexts. However, copyright seems to play more roles than just constraining ones.

Whether an archive’s remit is preservation on an economic or on a more cultural ground, exclusive ownership of materials seems to go hand in hand with the (financial) responsibility for its continued preservation. Law professor Séverine Dusollier (2010, p. 8) states, irrespective of the consequence of archival policy leading to either underexposure or overexposure of public domain works, that a “lack of protection cannot in itself impose free access to the copies of public domain works”. In that same World Intellectual Property Organization (WIPO) study that she prepared, Dusollier continues:

Access to and use of an intellectual creation will require obtaining access to a material embodiment of such work. Such access can be lawfully controlled by the owner of this tangible copy of the work. Copyright, and its opposite the public domain, only pertain to the intangible work, and should be distinguished, and will normally be exercised separately, from the material property. Controlling access to tangible copies of works is a legitimate exercise of property rights. When no other copy of the work is available except the unique tangible embodiment reserved by its owner, enjoyment of the public domain work requires access to the latter. [...] such creation, albeit theoretically in the public domain, is in reality outside the public domain as no one can enjoy it. (39)

Applied to the case of archival film distribution, this holds true as well: whoever owns the material property can control the access to (and the use of) the tangible work, a legitimate exercise of property rights even though the films’ copyright might have

expired. It also means that having access to a material copy of the film to transfer is the main particular that is needed for further distribution of the work when that work is said to be in the public domain and therefore can be copied and distributed without the need for prior permission of the copyright owner¹².

The example of CHARADE (US 1963, Stanley Donen) makes transparent not only the rigour with which copyright law is applied but also illustrates the tension between access to a material copy of a film to transfer and further distribution of a work. Originally produced and distributed by Universal Pictures, the film became public domain as soon as it was released because strict compliance requirements at the time were not met. If a pre-1978 US film was first published (sold or leased in copies to the general public), without a proper copyright notice (consisting of three elements: 1) the word ‘copyright’ or the © symbol; 2) name of copyright owner and 3) date of first publication), then under the Copyright Law of 1909 (in force for films created before Jan. 1, 1978), the film entered the public domain at the moment of that publication (Schwartz, 2013, in email to author). The particular film frames of the opening credits of CHARADE read ‘MCMLXIII BY UNIVERSAL PICTURES COMPANY, INC AND STANLEY DONEN FILMS, INC ALL RIGHTS RESERVED’. In an article addressing why several classic films from the studio era became public domain, David Pierce explains: “It is obvious today, but no one noticed at the time that this notice is missing the word ‘copyright’ or the © symbol” (Pierce, 2007, p. 130).

Copyright protection, however, is territorial:

If a film is first published in the US with no copyright notice, it is in the public domain in the US. But, the fact that a film is public domain in the US, does

¹² Provided there are no further underlying rights, such as to a novel or a play, that apply to the work.

not make it public domain in any other country. The EU defines authorship of film as the natural authors (not the producing entity) - generally including the director, cinematographer and composer of music. And the EU countries define copyright duration as based on the life of those authors of a film, plus 70 years after the death of the last surviving author. So ... even if all ... authors died ... right after the film was made, and even if it is public domain in the US, the film is protected in the EU (all 27 countries). (Schwartz, 2013, in email to author)

This legal complexity has led to a confusing international distribution situation. The film is in the public domain officially in the US only. A provision in international copyright treaties, *the rule of the shorter term*, allows that “signatory countries can limit the duration of copyright they grant to foreign works under national treatment to *at most* the copyright term granted in the work’s origin country”. It would follow from this that countries outside the US would adopt the term of protection *in* the US, in this case zero as the film is in the public domain. Material access to film copies has led to many different VHS and DVD editions, of varying quality. Over the decades, the film has proven to be very popular with audiences; the popularity of the film might possibly have been helped by its heightened visibility due to its public domain status. Universal, as owner of and therefore with access to the highest quality original negatives, decided to exclusively license “the only authorized professional transfer” (Dessem, 2006) of the film to Criterion in 2004, rather than releasing a DVD edition themselves, a situation comparable to Paramount not releasing the DVD of *BEYOND THE ROCKS*. The specific lay-out of the DVD including all the extra added-value is protected as such, so the DVD seems to function not only as a way to disseminate the film widely, but also as a way to try to ‘re-protect’ (a particular version of) the public domain work. The main feature itself, however, remains public domain in the US and it is possible that the film gets ‘ripped’ for further distribution by someone else. A relatively small circulation and not being able to protect themselves against possible

infringement are arguably some of the reasons why the studio deemed the investment to release the title themselves not worthy. The film material, which is in the public domain in the US, is held in the studio's collection, but for taking on the further international public accessibility Universal chose an outside party.

Conclusions

By examining the various practices in which digital access to public domain works is provided—a category of works that should not pose any legal restrictions—but also by demonstrating how exclusive material ownership of source material and the financial responsibility for the material’s further preservation can sometimes lead to varying ‘circumvention’ scenarios, in this chapter it has been illustrated that access is not only controlled by those who own the rights, but also by those who own the physical assets. It has been underexposed that even when there are no legal restrictions, digitised collections are skewed as opposed to their analogue sources, which reveals not only certain economics of access but also a contributing factor of human agency. Although the digital skew seems to be partially rooted in a legal paradigm, the chapter has highlighted how the digital skew is not to be understood as a purely legal issue, but as a more complex one in which economics of archival access and human agency play a fundamental role. Making moving image material available involves human agency. Even making orphan works available, works that seem to be gridlocked only legally, involves human agency and the institutions that control the evidentiary holdings actively shape access to some of the holdings.

Rather than simply viewing copyright in the context of the film archive in a negative way, as constraining only, it can be recast in a productive light. In light of Foucault, who was “less concerned with focusing on oppression, but rather in foregrounding resistance to power” (Mills, 2003, pp. 33–34), the archive can be seen as a “vehicle of power”, an active site of agency, power and resistance. On the one hand, the film archive, as a site of knowledge production realised specifically through a set of relations (Foucault, 1972), can be seen as the ‘oppressed’; it is subjected to copyright law, against the constraints of which it can be seen to resist. On the other

hand, that archive can also be seen as the ‘oppressor’; it exerts control over its holdings and makes productive use of copyright in its involvement in the interplay between the ownership of the physical objects and the ability to control the subsequent use and dissemination of those objects. Through some of these resistant and productive practices, such as providing access to public domain works as illustrated in this chapter, the film archive helps to actively shape access to its film archival holdings as well as a particular potential for film history writing. More precisely, it is the individuals working in the archive who should “not be seen simply as the recipients of power, but as the ‘place’ where power is enacted and the place where it is resisted” (Mills, 2003, p. 35). Archivists decide, restrict, resist, make available; they play a role in the power relations between the film archive, copyright and the larger dynamics of film history writing, they are the “vehicles of power”.

Archives are the sites of a fragmentising effect and the particular part of the archival fragmentation that was highlighted in this chapter is that even when a part of the extant record is legally available, it is not necessarily publicly accessible; it has to actively be *made* available. The last three chapters have systematically addressed the quadrants of the legal cross-section presented at the beginning of the thesis. They have focused on access activities related to the copyrighted film, the orphan film and the public domain film in which the film archive was identified as a Swiss bank with an obligation to maintain confidentiality about its holdings; as a temporary placeholder, a warehouse for absent rights holders and as a vehicle of power, in which individuals have created an active site of agency, power and resistance. In the next chapter, all of these access activities can be seen to intersect in the particular artistic intervention of re-using archival film. The archive will then be seen as a birthplace, where archival film becomes a raw ingredient for new products.

5 A BIRTHPLACE

Introduction

In order to make more transparent the role of the archival institution in shaping its access related activities and therefore its engagement with the potential of history making of its holdings, in what precedes, the particular filter of copyright was used to indicate that not all material is or can be (made) available. A legal cross-section introduced works that are difficult to re-use or provide access to in chapters two (the copyrighted film) and three (the orphan film). This led in chapter four to a shift in focus from copyright ownership to exclusive ownership of the source materials by examining works without a legal restriction, the public domain works, the analysis of which exposed a certain human agency in making material available. From this observation, it is worth revisiting in this chapter *through* the insights of the public domain a very specific part of the orphan works: the unidentified fragments. Revisiting some of the orphan works through such concepts as exclusive ownership and human agency will enable the debate to start shifting away from an exclusively legal one.

In order to address some of the distinctive access policies examined in earlier chapters collectively, this chapter will examine the particular artistic intervention of re-using archival film, both within and, in contrast, outside of the context of the film archival institution. It can be seen as a contemporary practice of a ‘return’ to the filmic source, as ‘doing’ film history with the films themselves. Just as the historical

examples in the first chapter, it can be seen as resistant and revisionist in nature as it challenges canonical film history, the way that history has been written (Thouvenel, 2008) as well as the institutional role of the film archive in constructing a particular film history. The archive can be seen as ‘a birthplace’, where the archival film material becomes a raw ingredient for new products. The particular part of the fragmentation this chapter considers is that multiple levels of archival fragmentation intersect in the artistic practice; not only on the level of the actual film as the re-use of unidentified film fragments is addressed, but also on the level of fragmented availability of source material. By highlighting the potential of the archive, found footage filmmaking brings attention to the partial picture of the archive that is visible.

5.1 BITS & PIECES, From “Less than Orphans” to Orphan Works

The legal cross-section presented at the beginning of the thesis (p. 38) presented four distinct quadrants based on the copyright ownership status of the material.

Unidentified fragments are pieces of film that are unidentified, often because there is no complete identifiable copy of the work available, which includes opening or closing credits. In such a case, a rights holder cannot be determined or sought and often it cannot even be determined whether the film is still protected at all. As they are works that might still be copyrighted, unidentified fragments can be seen as orphan works *par excellence*¹.

EYE is the only institution in the world that has assembled unidentified fragments and turned them into a frequently used presentation collection of their own. As Hertogs and De Klerk (1994, p. 9) have described, the BITS & PIECES collection is a “series of (generally) short unidentified fragments of film, preserved primarily on account of the aesthetic value of the images”. The collection of film fragments that started as an aesthetic experiment in the 1990s can now be seen as orphan works and as central to a legal debate. Chapter three has highlighted that orphan works are difficult to re-use beyond the context of the film archive and in contrast to those orphan works highlighted in chapter three, the BITS & PIECES appear not to be ‘problematic’. Despite it being a collection of eminently orphan works, the BITS & PIECES are at the core of the re-use and distribution policy of EYE, which underlines the human agency in providing access to material, introduced in the previous chapter. It is that human agency that will be used in this chapter as a determinant to (further) unravel the hierarchy of extant, potentially available and publicly accessible material and therefore its ‘possibili-

¹ Information provided by Leontien Bout, Legal Counsel of EYE Film Institute in email, 24 April 2014. They are, however, not considered to be anonymous works, which fall under a separate scheme.

ties for history making'. This chapter will focus on how in their capacity as unidentified fragments, and as orphan works more generally, they can be seen as a challenge to both canonical film history with a focus on complete titles and the way that film history has been written, without focussing on the lacunae. And moreover, as these fragments, as former deputy director of the Nederlands Filmmuseum Peter Delpout (1990, p. 77) has argued, "question the politics of the archival work", how orphan works can be seen to challenge the institutional role of the film archive in writing a particular kind of film history.

As one of the earliest compilers of the BITS & PIECES collection, and as someone who has constantly reflected on his film practices through his writings, Peter Delpout wrote *Cinéma Perdu* (1997), a booklet with a collection of small essays that accompanied the Dutch television series of the same name in which archival footage from the Nederlands Filmmuseum was featured. It is worth reproducing one of the essays, entitled 'Film Shreds', in total here as it highlights his experiences of the late 1980s and early 1990s:

In 1987 the Dutch government gave the Nederlands Filmmuseum the opportunity to make a 'clean sweep'. In previous years, the storage bunkers of the archive had literally become clogged. Effective management had been impossible in all those years of limited financial scope. Items had been collected indeed, but much more than that had hardly been possible.

With the pragmatism of a real cleaning company the then newly appointed director Hoos Blotkamp decided to just open up all the piles of cans and to identify what was in it. The adage was: start at the lower left, end at the top right.

Initially the major cleaning operation seemed to be a huge disappointment. What emerged was not a neat and orderly film history, not a range of famous film titles and known masterpieces. The thousands of film cans were found to contain a mishmash of films, most of which could not be traced in the existing film literature. The lists that were constructed contained countless unknown titles; moreover, they were often followed by the notification 'incomplete'.

Had the museum been collecting rubbish for forty years or was there more to it? There was only one solution. All the material was to be viewed again with

fresh eyes. And along with Eric de Kuyper, the then Deputy Director, I was allowed to do that.

We tumbled from one surprise into another. What we saw was not an official film history, but the footage was no less intriguing. Lachrymose melodramas, naughty comedies, virginal polar landscapes, dazzling sparks in a steel foundry, catchy vaudeville acts, all in unexpected colours or restrained black and white tones. Much of it was battered; the film was often literally shredded.

Special cases were the film rolls that were merely a few feet long, without a real beginning or end. We would find ourselves in the midst of a violent scene between husband and wife, but we could only guess how the complications would end. Or we would see a procession of workers, but we would never find out the why of it. Or the camera moved along a coloured mountain landscape, but before the movement was completed the strip of film had already run out of the viewing table.

In many film archives these types of fragments disappear into the bin. They are difficult to catalogue, and who would ever want to see them again as so little is known about them? ‘But they are often so beautiful...’, we sighed again and again in our weekly meetings.

Ultimately the solution proved to be to compile a small collection of the most beautiful pieces. Eric de Kuyper thought they had to be called BITS & PIECES. Much later guest programmer Dirk Lauwaert came up with the even more beautiful term of ‘film shreds’.

Now, these shreds, each labelled with their own number, are preserved and used, which primarily means: shown. All these scraps of film seem to have been invented to play with, to be scrambled together and to be transformed into new film experiences. (Delpeut, 1997, pp. 81–82; *author’s translation*)

An aesthetic reasoning to preserve films and to build up a film collection rather than a historical one based on categories of written film history was “revolutionary” in the archiving landscape in the early 1990s, as recently reiterated by Mark-Paul Meyer, senior curator of EYE and long-time compiler of the BITS & PIECES (Olesen, 2013). Within other archives of the time, most notably at the Cinémathèque française, films were preserved because they were handpicked from a list of titles on paper by an external committee (Delpeut, 2012) and therefore often followed the historical canon, which was then maintained by that committee. Film preservation not in terms of a canon or a list but on the terms of the materials themselves was a new approach to film preservation and *seeing* the films as a condition for preservation became a

standard at the Nederlands Filmmuseum (Hertogs and De Klerk, 1994). What was also new in the context of the unidentified fragments was that the main preservation selection motive of the compilation of the BITS & PIECES was their aesthetic power, and moreover, the visual power was based on the Filmmuseum employees' viewing experiences, personal insights and aesthetic taste with a quite arbitrary collection composition as a result.

Alongside the aesthetic reasoning, for Delpeut and De Kuyper there was also a more historiographic reasoning behind some of the presentation strategies that emerged in the late 1980s, early 1990s at the Nederlands Filmmuseum:

“[I]dentification, cataloguing, however useful, are activities that make the professional forget that looking and enjoying the process of looking are the ultimate basic conditions to collecting films in archives at all” (Delpeut, 1990, p. 80). The non-discriminatory selection policy that was made visible in compiling the BITS & PIECES, which were fragmentary and mainly enjoyable to look at, was a direct result of what Olesen (2013) has recently described as the “discrepancy between the theory of film history and film archival practice” that De Kuyper, Delpeut and Meyer experienced in the late 1980s in the film archival practice and started to formulate in such thematic *Lost and Found* programmes at the Cinema Ritrovato film festival in Bologna as well as at the International Film Festival Rotterdam (Delpeut, 1990). Olesen explains that the BITS & PIECES were initiated at a time when

... film historians went into film archives in a revisionist spirit to rediscover neglected directors, actors, exhibition practices and technologies to display their findings at recently established film history festivals such as *Le Giornate del Cinema Muto* (1982), *Il Cinema Ritrovato* (1986) and *Cinémémoire* (1991). The Nederlands Filmmuseum, then headed by deputy director Eric de Kuyper, gained a significant voice in this landscape by propagating the view that film historians neglected the actual composition of film archives in their pursuit of rediscovery. Film historians, de Kuyper argued, overlooked fragments which could not be attributed to an author or fit into an aesthetic

school, pointing to a discrepancy between theory of film history and film archival practice which needed to be challenged by new forms of presenting and valorising unidentified fragments. The initiative of BITS & PIECES emerged out of this observation as a way of showcasing the film archive's fragments. As Mark-Paul Meyer explains: "A lot of material had not been viewed or seen by people for decades, so the only way was to go through it one by one. In that process you find a lot of material that is rubbish, but which when you view it you discover that for a number of reasons is so fascinating, for example because of a mise-en-scène or a setting, that you want to keep it". (Olesen, 2013, [*unpublished version, in email to author*])

Film fragments have rarely been the focus of academic writing and there is no direct discussion of film fragments in general, or BITS & PIECES in particular, within a legal context for archival access purposes as is described in this thesis, which takes fragmentation and only the partial picture that is visible of archival sources as its theme. Wholeness of a film as a conceptual prerequisite for writing film history, was addressed by Dominique Païni (1997), former director of the Cinémathèque française, in an article for the *Journal of Film Preservation*:

Over the course of many years, for the pioneering film archivists, the preservation and presentation of cinematic works concerned complete films only. It involved locating, preserving, and exhibiting films in a maximal state of completion. A kind of logical identity was thus implicitly established between a complete film and a preserved film. (p. 16)

He continues to say that the first histories were written according to "a standard of wholeness, or of that which was judged to be whole, even if only provisionally" (Païni, 1997, p. 16), an idea which resonates on multiple levels in the film archival practice. It resonates with 'completing' film collections so that a wide and varied account of a national or local film history is represented; it also resonates with completing individual film copies through methods of restoration. And arguably, it is these 'most complete' versions of restored film titles that are shown at festivals or sold on DVD or Blu-ray and therefore engage more directly with the processes of history making. Cherchi Usai (2000, p. 64) asks the provocative question whether

restoration can be seen as creating a false completeness: “does the act of collating different prints in order to create a new one deliberately disregard the very history which has brought the print to the state in which it has come down to us?” Earlier in the book Cherchi Usai stated that “looking at the Venus de Milo without arms is all right, but it doesn’t seem all right to imagine CASABLANCA without the farewell scene” (p. 62), a point that he picked up in a recent conversation with film curator and CEO of the National Film and Sound Archive of Australia Michael Loebenstein. The conversation is transcribed in their joint 2008 publication *Film Curatorship: Archives, Museums and the Digital Marketplace*: “while it is perfectly OK to appreciate a fragment of a Roman sculpture, the fragment of a film, however beautiful, will never receive the same degree of attention” (p. 203). Loebenstein answers:

I think the fragment can also be very important in terms of context, and in terms of, for instance, writing history. The digital revolution in a way also changes our perception, since it very much encourages a notion of history that presents some kind of false completeness of things. In a way, it reintroduces the great narrative into culture. So fragments can also be presented as something that refuses the notion of a hegemonic closed narrative and an abstract, objective viewpoint. The analog fragment points to an *incompleteness*. Presenting the fragment properly, and comparing it to various simulations of completeness, can be essential to us as educators and as historians. (2008, p. 203, emphasis in original)

Although the conversation continues around the compelling question whether there can ever be such a thing as a *digital* fragment, it is the (denial of the) fragmentary state of large parts of film heritage that is foregrounded in this discussion. It is the daily reality of a film archive that “time has eaten everything” (Delpeut, 1990, p. 78); fragments underpin, and challenge, the concept of wholeness: they are underrepresented in the drive to inclusivity and completism that steers certain film archives and canonical theories of film history:

An incomplete film is a museum object of lesser value, something that archives strive to preserve when they can, but only a few hard-core specialists are keen to watch. Some institutions have even declared that their primary goal is the preservation of complete films, thus giving up the crucial challenge of educating the viewer on the intrinsic value of a fragment as an entity with its own right to exist as such. (Cherchi Usai, 2000, p. 64)

It is a very selective part of the archive that can get written about; not only the material that is potentially available and publicly accessible but also mostly the material that is whole.

An estimate from the early 1990s states that 25% of the collection of the Nederlands Filmmuseum was made up of fragments (Delpout, 1990). Some fragments were quite long, some were shorter; some were outtakes and some have been cut from larger films for censoring reasons, for instance. A small part of the 25% of fragments is unidentified and the even more inferior role that unidentified film fragments play in film history was expressed by Delpout in 1990 when he spoke of them as being “less than orphans”: “These pieces of film without a name, without a passport, are not only deprived of any legal status, they are even less than orphans, because in advance [they are] already depreciated. Without an identity they fall outside of any discussion and therefore outside of any selection” (Delpout, 1990, p. 76). De Kuyper has expressed it similarly when he spoke of a film that cannot be labelled with the help of historical notions, and therefore is unable to “acquire an historical identity...[which] means, literally, it does not exist for film history” (1994, p. 105). Before there even was such a term as the ‘orphan works problem’, (unidentified) film fragments as a part of the tactile remnants of film history, including their preservation and presentation, were seen to challenge concepts of wholeness and completism and re-emphasised the partial picture that is visible of an archival collection, quite literally.

EYE is the only archive to put these, otherwise to be discarded, unidentified film fragments together in order to present them and arguably, to challenge other archives in their presentation strategies. The fragments have been compiled into approximately 60 reels of circa 20 minutes each, with more than 600 individual BITS & PIECES. Some 70% of the reels are in colour and 30% in black and white; about 90% is compiled of silent footage, with 10% sound. Aside from their formal similarities (for duplication reasons, colour bits have been organised with other colour bits on a reel, sound with sound, etc.²), their numerical order is random. EYE is in the process of cutting the individual, now digitised, bits apart from their respective reels. They will not necessarily be presented anymore as compiled reels, but as the individual fragments they were intended to be.³

The BITS & PIECES have been re-used in numerous ways and in various projects, ranging from academic conferences, such as the ‘Amsterdam Workshop 1995 Disorderly Order: Colours in Silent Film’ as part of the evening screenings that workshop participants would see in blocks that would precede the next day plenary discussions⁴, to more commercial uses, such as DJ Spooky using them in his 2000 show ‘*Les Vestiges*’ (Traces) at the Louvre in Paris⁵. The BITS & PIECES have also been at the heart of some of the found footage work of Austrian filmmaker Gustav Deutsch, which will be the subject of the next part of this chapter.

² Because a lab charges a minimum length of film when duplicating and developing film (and a surcharge in duplicating a strip of film that is ‘too short’), several bits were compiled into a reel and duplicated all together. This is how the reels resulted in being black and white or colour exclusively; the same applies to silent and sound material; they were combined onto a reel for practical duplication and developing reasons.

³ Information provided by Giovanna Fossati in a personal conversation, 6 June 2014.

⁴ An edited transcript of the workshop is available in print: Hertogs, D. and De Klerk, N. (eds.) (1996) *Disorderly Order: Colours in Silent Film, The 1995 Amsterdam Workshop*. Amsterdam: Stichting Nederlands Filmmuseum.

⁵ <http://www.lesinrocks.com/2000/11/09/musique/techno-au-louvre-11227522/>.

The BITS & PIECES go to the core of the problem at hand: firmly rooted in a current legal debate as orphan works, they display that what is in a film archive is often fragmentary, and as will be argued in the remainder of this chapter, as an extension, they also highlight the role of the archive in the archival access debate. When re-used in found footage films, by highlighting the (latent) potential of the archive, the BITS & PIECES underline the partial picture of the archive that is visible only. After a focus on the practice of re-using of the unidentified film fragments, the challenge they pose to canonical film history and the institutional role of the film archive in shaping access to the potential sources of film history writing will be addressed in the third part of this chapter.

5.2 The Art of Using Leftovers

The legal studies dealing specifically with providing access to orphan works (van Gompel, 2007 (a), 2007 (b); Elferink & Ringnalda, 2008) reached the corresponding conclusion that if the works cannot be used legally, the use may be prevented. This is a conclusion that is not sufficient for the archival practice as productive and potentially beneficial uses would be hindered and the collections would remain dormant. A film archive can be seen as a birthplace, a place where cinematic heritage can become a rough ingredient for new films. Austrian filmmaker Gustav Deutsch has been working with extant film material for more than 20 years. In some of his work he can be called a filmmaker without a script⁶ and a filmmaker without a camera since many of his films start on the editing table where he creates a new story from extant film material. Deutsch sees the archive ideally as a place of production⁷ and works firmly within, what in this thesis will be called a film archival ‘institutional context’, as opposed to other filmmakers who re-use film footage that originates from outside that institutional context, such as personal film collections, video stores or the Internet.

As argued by film scholar William Wees (1993, p. 48), found footage films invest film material “with meanings unintended by its original makers and unrecognized in its original contexts of presentation and reception”. However, the re-contextualisation of material and how the juxtaposition of discrete images becomes meaningful remain outside of the scope of this thesis and this chapter in particular,

⁶ FILM IST. A GIRL & A GUN, part 13 in the series, was the first instalment for which Deutsch wrote a script. The Kinsey Institute for Research in Sex, Gender and Reproduction at Indiana University from where some of the films for this project originated demanded a script in light of the sensitivity of their (pornographic) material. Deutsch wrote a 90-page explanation of what archival film material would be used where and how in the respective chapter of the film.

⁷ Information pertaining to Gustav Deutsch and his working method in this part of the chapter is taken from two semi-structured interviews by the author with the filmmaker; the first one took place in March 2010 in Gorizia, Italy and the second one in April 2010 in New York, US.

which focuses on the ability to re-use certain film archival material based on its accessibility.

Literature on found footage is scarce, and mostly deals with the idea of ‘old’ images acquiring ‘new’ meanings in their new, amalgamated, states. Three books on the topic of found footage films all exclusively present an overview of the field at the time. Jay Leyda examines representation of history in compilation films in his 1964 publication *Films Beget Films*; Cecilia Hausheer and Christoph Settele have edited a volume as the result of a two-part retrospective of found footage films at the VIPER International Film and Video Festival in Luzern in 1991/92, entitled *Found Footage Film* (1992). William Wees’ *Recycled Images, the Art and Politics of Found Footage Films*, published in 1993 by Anthology Film Archives, presents an overview of the field with a North American focus. The emphasis in the latter publication is on “films constructed according to the principles of montage” (p. 4), which the author divides further into compilation, collage and appropriation. None of these publications address the legal provenance or copyright ownership of the source material as a focus of analysis or as a potential underlying constraint to some of the aspects of the practice. Literature on the practice of found footage is even scarcer. Scott MacDonald (1992; 1992; 1998; 2004; 2006) in his series *A Critical Cinema*, in which he interviews independent filmmakers, does discuss the practical aspects of some found footage filmmakers, but again, the legal aspect of the practice is omitted.

EYE has had a long interest in found footage filmmaking. Not only have filmmakers such as Gustav Deutsch or Bill Morrison been invited to come work with the collection; numerous film titles of filmmakers such as Matthias Müller, Yervant Gianikian and Angela Ricci Lucchi as well as Peter Tscherkassky to name but a few,

have been acquired for the permanent collection.⁸ According to Mark-Paul Meyer, senior curator of EYE, the institute's focus on found footage can be seen in direct relation to the composition of the collection:

The developments that converged in 1990 could be summarized in this way: the film archive was not perceived as an archive of historical documents that told the canonic story of film history, but instead as an archive of veiled stories and hidden meanings. The archive inspired research and programming as well as the unraveling of these secret stories and meanings and the creation of new contexts and meanings. And thus also the making of found footage films. (Meyer, 2012, p. 146)

EYE Example: FILM IST (AT 2002; 2009, Gustav Deutsch)

In this chapter, FILM IST, a series of found footage films⁹ by Deutsch (and his partner Hanna Schimek) will be used as an example as many BITS & PIECES have been reworked into particularly part 7-12 as well as part 13. Copyright is of little relevance until it comes into play when an archival work is reproduced and/or communicated to the public, which is when the problem addressed in this thesis is most palpable. In this case that means accessing the films in order to re-use them in another work. It will be possible to take the re-use of the BITS & PIECES in FILM IST to unravel the relationship between copyright ownership, exclusive ownership of source material and human agency, and therefore also the hierarchy between extant, available, and publicly accessible material, arguably important for the material's potential for history making. As highlighted in chapter three, orphan works pose a particular challenge in re-use practices, however, copyright does not seem to be a restrictive issue in the re-use of the orphaned collection of BITS & PIECES. Deutsch's example of re-using the

⁸ 'Found Footage' was also the theme of the opening exhibition and corresponding film programme of the opening of the new building of EYE Film Institute in Amsterdam in April 2012.

⁹ 1998 FILM IST. (1-6), 16mm, colour, b/w, 60min; 2002 FILM IST. (7-12), 35mm, colour, b/w, 90min; 2009 FILM IST. A GIRL & A GUN, 35mm, colour, 93min. For Deutsch' full filmography: <http://gustavdeutsch.net/> (last accessed: 22 November 2014).

unidentified fragments and orphan works more generally firmly underlines the human agency of the institution's archivists, introduced in the previous chapter, in (taking the risk of) making the material available.

Gustav Deutsch was invited by the Nederlands Filmmuseum after he had completed FILM IST. 1–6 to come work with their material and was provided with an editing table for three weeks and unlimited access to the museum's film collection and staff. Deutsch considers the Filmmuseum a co-producer¹⁰ rather than merely a place of research. Personal contact is the starting point of Deutsch's research as the visual knowledge and memory that the archivists and other archive staff members have of their collections are his main motivation: "One picks the archivist's brain for the unknown, unappreciated, unexpected films, not for the canon" (De Klerk, 2009, p. 113). Deutsch considers categories and cataloguing systems too limited and too restrictive as they work with such search topics as genre, title, year, name of the director, or a certain keyword. What Deutsch wants to find in archival film material is often so specific that only when someone remembers seeing a specific occurrence in a larger film, for instance, can it result in it being retrieved.

According to Wees (1993, pp. 16–17), "so strong is the mind's inclination to turn juxtaposed images into something meaningful ... that every alert viewer will find some way of associating and thematizing these images, even as he or she recognizes that they were never intended to be seen together". In order to tell his *own* story, as opposed to using famous clips that are infused with certain meanings already, Deutsch

¹⁰The opening credits of FILM IST. A GIRL & A GUN (part 13 of the series) mention four different archives aside from Loop Media, Deutsch' production company: the Nederlands Filmmuseum, the Austrian Filmmuseum, the Austrian Film Archive and the Imperial War Museum. In contrast to the numerous other archives mentioned in the closing credits of the film, these archives were considered to be 'producing partners' and in exchange for an opening credit, they didn't charge for their contribution. In exchange, at the end of the film production process these archives received a print of the new film for their collections.

needs the images to not be “as pre-charged”. Film scholar Eric Thouvenel (2008, p. 99) has argued that: “[F]amous films...have already been authenticated, that is to say, they are ‘signed’. Thus it is very difficult for found footage filmmakers to inject meaning into the text or to say something about themselves”. In order to try to prevent this from happening, Deutsch uses mostly non-canonical titles and (unidentified) fragments for his specific vision. EYE can be seen as an institute with predominantly non-canonical holdings and specifically the BITS & PIECES collection turned out to be a wide-ranging source for Deutsch in the research for his films. As opposed to a feature film, in which there might only be one or no usable clips at all, the BITS & PIECES as a collection of contingent, fragmentary and non-canonical records of history offered Deutsch a wider variety in the same time span.

Deutsch has encountered several restrictions to his creativity in the process of producing his films, but it was never in relation to the films identified as problematic in chapter three, the orphan films held by public archives, as the collaborating archives granted him the permission to reuse the often unique materials. His creative obstacles were always in relation to rights owners or owners of the physical holdings refusing their cooperation or slowing down the process of re-use significantly. There have been political reasons why certain films were deemed difficult. As highlighted in chapter two, certain titles have been deposited in a film archive under embargo and ICH KLAGE AN (DE 1941, Wolfgang Liebeneiner), a so-called *Vorbehaltsfilm*,¹¹ was one of those titles. After a lengthy correspondence back and forth with the German ministry of foreign affairs, the permission was ultimately granted and Deutsch used

¹¹ *Vorbehaltsfilme* are those films that have been denoted by the Friedrich-Wilhelm-Murnau-Stiftung in its film library as propaganda films from the National Socialism era, the contents of which are war glorifying, racist, or inciting. The films can be shown only with the consent and under the conditions of the Foundation. This requires in any case a historical introduction and a discussion with an expert guide (<http://de.wikipedia.org/wiki/Vorbehaltsfilm>).

excerpts of the film in FILM IST. A GIRL & A GUN (part 13 of the series). The Kinsey Institute for Research in Sex, Gender and Reproduction at Indiana University where some of the (stag) films used in FILM IST. A GIRL & A GUN originated restricted access to some of their holdings and declared the films shot by Alfred Kinsey himself in the 1940s and 1950s on human sexual behaviour off-limits to the filmmaker. Moreover, they are not available to watch for anyone (even within the archive). It turned out the Institute did not own the rights to the films Deutsch did re-use, so there was no legal ground on which to refuse access; based on their exclusive ownership of the source material they ultimately charged a handling fee.

When a film archive does not know who the rights holder to a film is, consequently, they cannot grant by law the filmmaker the permission to use the orphan work. This might pose creative obstacles to the filmmaker wishing to re-use the material. The archive can, however, still grant the filmmaker the ‘material’ permission to use it nonetheless, based on their exclusive material ownership of the source material and their archival agency. Deutsch has so far not encountered *any* resistance in using material that was orphaned, or not protected anymore, for which he therefore solely needed the approval of the respective archive as holders of the physical material. Deutsch’s practice reveals that behind an initial legal layer some of the economic factors of archival access and moreover, the human agency of the film archive’s staff in deciding, often based on a risk analysis, to make material accessible play an under-researched role.

A further (commercial) release of the amalgamated found footage film can be challenging. FILM IST. 1–6 and FILM IST. 7–12 have seen commercial DVD releases. A risk analysis has been made for the unidentified fragments that are part of these films. FILM IST. A GIRL & A GUN, however, does not only feature longer clips than the

previous two instalments but also clips from such famous and canonical films as Douglas Sirk's *LA HABAÑERA* (DE 1937) and Wolfgang Liebeneiner's *ICH KLASSE AN* (DE 1941) and will see most probably no commercial DVD release. The rights to Deutsch's film were cleared for theatrical release only and in case of a television broadcasting or a DVD or Blu-ray release, for instance, the rights would have to be re-cleared for that specific use.¹²

Another example in which archival/human agency played a significant role was the production of Peter Delpeut's 1991 film *LYRISCH NITRAAT* (*LYRICAL NITRATE*, NL 1990, Peter Delpeut). Delpeut was interested in telling the story of three misconceptions of early film ((1) silent film was mostly shown in colour; (2) silent film shows unexpected fluidity when projected at the correct speed and (3) silent film did not exclusively consist of slapsticks) and used the Nederlands Filmmuseum's *Desmet film collection* as a hook to tell the story. The group of silent films are still part of the collection of EYE and in 2011 were inscribed on the UNESCO Memory of the World Register.¹³ All fragments of *LYRISCH NITRAAT* originate from the Desmet collection, except for the decaying closing sequence¹⁴, which, according to Delpeut (2012, p. 223) "would never have ended up in the film if I had not worked at the film archives". The films of the Desmet collection had fallen into the public domain at the time of producing *LYRISCH NITRAAT* and the Filmmuseum exclusively owned the

¹² Sometimes productions get 'lost' in the archive itself: re-clearing the rights for a specific actor, because of contractual reasons, for instance, can be prohibitive to the extent that the production will not get re-broadcast. Information provided by Claudio Ricci, Technical Expert Film and Series, Swiss Radio and Television, in a personal conversation, 29 July 2014.

¹³ For more information, see <http://www.eyefilm.nl/en/news/eye%E2%80%99s-desmet-collection-inscribed-on-unesco%E2%80%99s-memory-of-the-world-register> (last accessed: 30 November 2014).

¹⁴ *WARFARE OF THE FLESH* (US 1917, Edward Warren) (Delpeut, 2012, p. 223). The decaying material at the end originates from the 'waste-bin' and was, according to Delpeut in email to author 28 March 2003, "too beautiful not to use". This piece of film was the only fragment that was specifically preserved for inclusion in *LYRICAL NITRATE*.

physical material. Delpout was deputy director at the moment he made the film and was firmly on the inside of the archive. He agreed with the Nederlands Filmmuseum only to use material that had already been preserved, therefore limiting his choices at the compiling moment, but “[a]ccess is the secret to any documentary” (Delpout, 2012, p. 220) and arguably, the film would not have been made at all if he had not had exclusive access to the nitrate source material and the highest possible standard duplication methods at the time. Found footage can be seen as a practice that keeps “collections in the public eye and [that makes] them matter to modern audiences (Russell, 2013). In the case of *LYRISCH NITRAAT*, putting the fragments together in a new amalgamated state can be seen as actual access that would otherwise not have been given to rather difficult titles to programme individually. The institute that housed the material helped to facilitate a particular narrative of film history.

By writing film history “with the films themselves” (Fossati, 2012, p. 179), found footage films continually ask the question what film is and by extension what film history and film historiography are and potentially even what the film archive is (for). By attempting to strip the films from the film history previously associated with them, they also foreground such concepts as authorship and ownership (Horwatt, 2009). The practices of the filmmakers outside of an institutional archival context bring this into clear tension: according to De Klerk (2009, p. 114), found footage films have been “a strong advocate for the vitality and liveness of [the Public Domain] by showcasing the potential of films that have fallen from the mainstream, but because of new and innovative ways of accessing canonical films, current found footage practices are no longer practices of re-using leftovers, as the tradition was long seen to be. Several current filmmakers position themselves firmly ‘against’

copyright law¹⁵ and as a result have found alternative ways of obtaining their material, circumventing archives and rights holders, as opposed to asking for the permission of rights holders, which most archives would require before they would provide the filmmakers with film clips. Deutsch, who usually works within an institutional context, whenever he acquires material from outside the film archival context, for instance, when he buys material on flea markets, or finds it on the street or receives material from others as they have become aware of his collecting films, he admits to “caring less” when it comes to clearing rights. When he takes material in that “no one else will take care of”, he does not take as much precaution as when the material originates from collaborating film archives. If by chance the material is famous and he is aware that there might be “issues”, in most cases he will not use it.

New possibilities in accessing films have arguably become the only possibility to produce such films and artworks as Chris Marclay’s *THE CLOCK* (UK 2010), Nicolas Provost’s *PAPILLON D’AMOUR* (B 2003) and *GRAVITY* (B 2007), or Vicky Bennett’s *THE SOUND OF THE END OF MUSIC* (UK 2010). Marclay employed a group of six assistants, who watched a plethora of films and ripped scenes showing or mentioning time off DVDs in order to provide the artist with a daily fresh load of clips (Zalewski, 2012). Copyright was not taken into consideration when producing *THE CLOCK*, as there had been no objection to any of Marclay’s appropriation art before (Zalewski, 2012). Nicolas Provost explained in a personal conversation with the author at the opening of the artist’s retrospective exhibition at *De Brakke Grond* in Amsterdam in April 2008, that he never would have been able to produce his works if he would have had to go to a film archive for his source material as opposed to the

¹⁵ As for instance expressed in several presentations at the ‘Recycled Film Symposium’, part of the 10th AV Festival in Newcastle, UK in March 2010.

local video store. In her presentation at the Recycled Film Symposium during the 10th AV Festival in March 2010 in Newcastle, UK, Bennett explained that she initially worked on what she calls a ‘local level’, predominantly from the genres of educational films and documentaries, and mostly on VHS. Currently DVDs and broadband Internet have enabled her to move into major blockbusters as well.

As Bordwell (2013) has recently argued, different ways of accessing material outside of the institutional context of the film archive have eradicated what he terms the “economy of scarcity”:

Throughout the 1970s and early 1980s, an economy of scarcity still ruled. Most films, even recent commercial hits, could be found only in studio libraries and public or privately maintained film archives. ... A procession of new technologies, starting in the 1970s, radically and forever changed access to films, [such as] cable television, ... VHS, [and] DVD. ... With so many films easily available on digital formats, people who relied upon archives have found other options. ... Home video abolished the economy of scarcity. (Bordwell, 2013, pp. 76–78)

While this affects such people as educators who have come to rely on teaching film history with DVD predominantly, it has also affected the practice of contemporary found footage filmmaking. The work of artists producing film works outside of the context of institutional archives is self-referential as it underlines the legal provenance of its source material. The work can be seen as ‘legally resistant’ and the ways in which new possibilities in accessing films such as DVDs and the Internet are used challenge the very *raison d’être* of the film archive. One of those reasons might be to provide the orphan works, the legally uncertain works, with a birthplace, as outside of the institutional context without a commercial incentive for preservation these works would languish.

It is not only the BITS & PIECES, which have been found as fragments, that point to the fragmentary state of the archive. Fragments that have been *made*

fragments, such as in Delpeut's film *LYRISCH NITRAAT*, fragments that have been cut down from larger, arguably complete films, also point to the fragmentary state of the archive. Films such as Delpeut's *LYRISCH NITRAAT* or Bill Morrison's *DECASIA* (US 2002, Bill Morrison) for instance can be seen as highlighting the latent potential of the film archive. Just as the film archive, as a site of fragmentation, in this thesis is identified as a mediator between copyright and film historiography, the practice of found footage, whether within an institutional role of the film archive or as resistant outside of it, can be seen as an expression of that mediating role.

5.3 “BITS & PIECES as Synecdoche”: A Challenge to Film History

The last part of this chapter will highlight how unidentified film fragments and orphan works more generally can be seen as a challenge to canonical film history and to the role of the film archive in shaping its access related activities and therefore its engagement with the potential of history making of its holdings. Film fragments in general, and unidentified fragments in particular, defy classical categories that a film archive arguably has to work with:

The presence of the fragment in the film museum's archives poses the archivists for a hitherto accepted boundary. Exceeding that limit could teach them that their gaze is often dominated exclusively by the rational categories of written film history. The film fragment and handling it can thus challenge the archivist to not only approach the BITS & PIECES differently but also the entire collection. The films should firstly be the subject of pleasure and should only be secondarily the subject of identification (and all related rational activities). That state of affairs can provoke the film archive to approach film history ... more from an aesthetic standpoint than from a historical one. Films exist then as the bearer of an affective relationship, not merely as a historical fact. This also means that when screening the films from the archive they should firstly be presented as fun and entertaining facts, not as historical facts. Perhaps this would also provoke a different kind of choices, other selections in conservation schemes. Perhaps the archivist must identify not only with being a custodian and a guardian, but also as a filmmaker, an *editor* of a beautiful, everlasting film. (Delpet, 1990, pp. 80–84, *author's translation*)

As opposed to the prevailing historical reasoning for film preservation, as cultured by other national archives, it was an aesthetic choice based on the archivist's taste and personal insights that led to the compilation of the BITS & PIECES and to the finding of new ways of presenting the sometimes unusual material, and as stated in the first two chapters and reiterated in this one, helped develop a new film historical canon. As Fossati (2012, p. 179) writes, the archive has “always written history by selecting (also by necessity) only a very limited fraction of films to be preserved and presented”, and the Nederlands Filmmuseum has never made it a practice to hide the subjectiveness of its selection. Not only was a new film historical canon being

proposed, simultaneously the traditional canon was being challenged: making material available directly influences what can be researched and the film archive is “partly responsible for film historians’ presuppositions about the source material” (Lameris, 2007, p. 139).

In her book *The West in Early Cinema, After the Beginning* (2006), film scholar Nanna Verhoeff stresses that “every object found in the archive is a fragment of an irretrievable, ever-widening whole: the ‘complete’ film, the ‘genre’, the program, the cultural habits of watching films, the culture” (p. 27). In line of that thought she proposes the idea of the “BITS & PIECES as synecdoche” (Verhoeff, 2006, p. 37), which is a figure of speech in which a term for a part of something refers to the whole of something, or vice versa or as she terms it “the extension of meaning from bit to whole” (p. 37). In the light of this thesis the figure of speech is important because it provides a way to see the BITS & PIECES as emblematic for the larger group of orphan works, the problem of which this thesis has shown is a combination of legality and the human agency involved. With lacunary availability of the materials as a consequence, the public accessibility of the archive is accentuated, and therefore its potential for history making.

While the ultimate goal in film restoration is often a film version that is as complete as possible, the BITS & PIECES show the remains of the archive and as such, the film fragments expose the illusion of completeness of the film archive by being shown in their incompleteness. The fragments do not only emphasise that a large part of an archive is in a fragmentary state, the choice to present the fragments as fragments just because they are beautiful, challenges both canonical film history with a focus on complete titles and the way that film history has been told, without focussing on the lacunae. Re-using the film fragments in found footage films takes

this debate to another level, as it proposes narratives to emerge from the archive, which are arguably different from the narratives the individual films would have been able to tell. When re-used in found footage films, by highlighting the (latent) potential of the archive, the BITS & PIECES underline the partial picture of the archive that is visible only.

A significant change in archive policy and priority has brought about a ‘new’ archival practice, which values public accessibility and open information, and which justifies its function through its use (Prelinger, 2010). New ways of accessing and using collections have been and are being created by new technologies and new ways of distributing. A particular current issue is how digitisation provokes a review of archival holdings¹⁶. EYE has been able to hold on to the experimental attitude that has been characteristic of the Nederlands Filmmuseum. According to Delpeut, in response to the opening of the Orphan Film Symposium in March 2014 in EYE: “technical knowledge, fortitude of content and above all creative forms of presentation still characterise the work of the current staff”¹⁷, which includes inviting others to re-use the collection creatively as well as finding new and creative ways to present their own collection. EYE has been able to be responsive to epistemic shifts by deciding to develop certain access initiatives.

In the late 1970s, classic film history with its linear macro histories shifted to a revisionism that presented non-linear micro histories. Just like revisionist film history, which actively looked for gaps, the orphan film movement centralises lesser-known films and it takes the film archive as a surviving as well as composing structure of a

¹⁶ According to Charles Musser (2014, p. 152), in commenting on Caroline Frick’s 2011 publication *Saving Cinema: the Politics of Preservation*, “Caroline Frick may be right that for better or worse, the act of digitizing for access may turn out to be the only act of preservation many films receive”.

¹⁷ <http://www.programma.eyefilm.nl/nieuws/in-memoriam-hoos-blotkamp> (last accessed: 31 August 2014).

certain film historical narrative into consideration. The production and the preservation of an archive is not only a surviving structure of past processes but also constructive in the processes that turn the current archive into a future surviving structure of the past, in other words, the archive is at once the result of a particular historical narrative as much as an instrument for constructing a new one. As film fragments, and unidentified ones specifically, are difficult to integrate into a narrative that consensually can be called film history, the unidentified film fragments, and orphan works more generally, therefore challenge the institutional role of the film archive in constructing film history writing, and can therefore be seen as a metaphor of the potential availability and public accessibility of archival film.

Conclusions

In this chapter a specific type of orphan works, the unidentified fragments in the form of EYE's BITS & PIECES collection, were re-examined through the public domain works of chapter four. In that chapter, it was suggested that if even works that are supposed to be free from legal restrictions were not necessarily publicly available, some other aspects of the contemporary economics of access needed to be unravelled. Revisiting some of the orphan works through such concepts as exclusive ownership and human agency enabled the debate to start shifting away from an exclusively legal one. Taking the orphan works problem out of the exclusively legal debate is necessary in order to show that 'orphan work' as a term for something that is not available can be seen as an oxymoron.

Examining the re-use of the BITS & PIECES has helped to start unravelling the relationship between copyright ownership, exclusive ownership of unique source material and human agency, as well as the hierarchy between extant, available, and publicly accessible material, arguably important to the material's potential for history making. As highlighted in chapter three, orphan works pose a particular challenge in re-use practices, however, copyright does not seem to be a restrictive issue in the re-use of the orphaned collection of BITS & PIECES. The orphan works problem can be seen as a combination of a specific legality and human agency. Filmmaker Gustav Deutsch' practice of re-using the unidentified fragments, and orphan works more generally, has firmly underlined the human agency involved in deciding to make material available, introduced in the previous chapter.

The film archive can be seen as a birthplace where archival film becomes the raw ingredients of new products. What the artistic intervention of re-using archival film, specifically the art of using leftovers, has foregrounded is that copyright can be

seen to perform a constraining as well as a resistant and productive role. 'Doing' history with the films themselves, challenges canonical film history, the way that history has been written and the institutional role of the archive in the construction of that process. Orphan works can be seen as a metaphor for availability and public accessibility of archival film, and the work produced by filmmakers re-using archival film with a provenance outside of the institutional context of the film archive can be seen as 'legally resistant'. The particular part of the fragmentation this chapter has considered is that multiple levels of archival fragmentation intersect in the artistic practice of re-using archival film; not only on the level of the actual film as the re-use of unidentified film fragments was addressed, but also on the level of fragmented availability of source material. By highlighting the potential of the archive, found footage filmmaking brings attention to the partial picture of the archive that is visible.

CONCLUSION

This final chapter of the thesis attempts to weave together the threads of each of the chapters in a wider theoretical fabric. It will reconsider the different notions of copyright, film history writing and the film archive highlighted in the individual chapters as well as their interrelatedness. They will be seen not only as multifaceted but also as cumulative. The specific filter of copyright can be seen quite literally as cumulative as over the years elements have been added to the existing law until it has formed a sort of *patchwork quilt* (Alberdingk Thijm, 2008). Film history writing can be seen as multifaceted and cumulative as in the conclusion the distinctive aspects of fragmentation identified in the discrete chapters will be considered collectively. The films that are extant are not necessarily available and the ones that are available are not necessarily publicly accessible. 'Doing' film history in the context of the film archive should then always be seen in consideration of an ever increasingly narrowing fragmentation of accessible material that takes place in the film archive. In turn, the film archive can be seen as multifaceted and cumulative because it can be seen to be all of the notions highlighted in the discrete chapters. It can be terra incognita, a conglomerate of broom closets, a Swiss bank, a temporary placeholder, a vehicle of power and a birthplace. In the specific context of this thesis, it needs to be seen as an intersection of multiple layers of fragmentation and as such as a mediator between copyright and film historiography. All of these notions work together to provide access to the material and thereby giving it potential for 'history making'.

The chapter will address the implications of the research as well as the limitations of the research, before it will conclude with a section on the contribution of the thesis and with suggestions for further research questions and directions to which the research in this thesis in turn might lead.

Implications of the Research

The project has examined a timely issue because a significant change in the public work of many archives has brought about a ‘new’ archival practice, which values public accessibility and which justifies its function through its use (Prelinger, 2010). New ways of accessing and using archival collections have been and are being created by new technologies and new ways of distributing. In turn, technological change can be seen to drive legal change; this thesis has examined copyright as a component that underpins archiving policy and film history writing on the verge of implementations of new orphan works legislation. In doing so, the goal of this thesis has been twofold: on the one hand, by examining what the implications of copyright legislation were for the public sector audiovisual archive, with its specific remit and practices of film preservation, restoration and dissemination, the objective has been to investigate the relationship between the film archive, copyright and film history writing. On the other hand, by analysing the film archival access practice through the particular filter of copyright as a determining factor of why the accessible part of the film archive is only a partial picture, an additional objective has been a potential contribution to the analysis of other topics in a wider contemporary media studies landscape.

Facets of the Film Archive

Before the contribution to academic literature and wider applications of the thesis will be discussed, first some collective main findings will be highlighted, both on a content level as well as on the level of the study as a whole. The focus in this thesis has been on a specific film archive, housing and safeguarding a specific corpus of work, in one country with a specific jurisdiction, during a certain period of time in the early noughties when the particular constellation of technological, social, economic and institutional factors impacting the film archive and copyright could be seen as

relatively 'stable'. Some of the digital access practices of EYE Film Institute Netherlands between 2002-2005 have been analysed based on case studies that followed from a subdivision of the museum's collection into in so-called legal collections. The idea has been to show that the film archive can be seen to actively shape access to its film archival holdings and in doing so helps to create a particular potential for film history writing.

One of the case studies highlighted in the thesis was a film under embargo. Public archives have the remit to preserve and to provide access to film material but in this particular case, the rightsholder had explicitly forbidden the exploitation of the title. The museum's staff successfully negotiated with the rightsholder's heirs after his death and subsequently restored and re-released the film after it had not been available for close to 40 years. Another case study was an orphan work, a film without a clear current copyright holder. Based on a risk analysis, the museum's staff decided to publish the film on DVD with a delay despite the film's unclear rights situation, following from some of the turning points in the original production company's business past being obscure. Yet another case study was a public domain title. The US produced film considered to be lost was found in the Dutch national archive nearly 80 years after its original date of production. The museum's staff found external funding to digitally restore and re-release the film, which was not in the interest of the producing and distributing studio anymore, arguably because of the film's public domain status.

There was nothing particularly unique to the copyright situation in the Netherlands at the time in which the research in this thesis is set, except for perhaps a practical awareness of predominantly the burgeoning orphan works problem. Retrospectively, that awareness can be ascertained in several other European

countries as well as the US. It is, however, the particular attitude and human agency the museum's staff decided to exercise that might be particular to the Dutch situation at the time, but cannot be seen as separate from the organisational, social and political climate the archive as a set of relations in itself can be seen to function in. Part of that archival climate is based on a risk analysis in itself, as no rights holders had ever come forward after a work was made public without permission in the history of the museum. Because of its open and experimental attitude, and the particular non-canonical composition of its collection, the museum and its staff have been able to respond to artistic initiatives, in which the museum can be seen to have been a co-producing partner in several found footage projects in which orphaned, public domain and copyrighted material from the collection has been re-used. Other archives, such as the Academy Film Archive, who house amongst other collections celebrities' home movie footage for instance, deal with other rights and sensitivity issues. Another example is the Kinsey Institute for Research in Sex, Gender and Reproduction highlighted in chapter five.

The Filmmuseum's collection in the early noughties, the period under scrutiny in this thesis, was partially a result of the preservation practices that were started in the late 1980s. As addressed in the first chapter, the Nederlands Filmmuseum was revolutionary in its approach to systematically watching all film material before reaching a preservation advice, starting in the late 1980s and early 1990s. At the same time, new generations started to spearhead European film archives and international cooperation was fruitful. However, according to De Kuyper (2013, p. 128), the Dutch "openness and willingness to negotiate surprised some colleagues". De Kuyper challenged his own staff, but also the staff of other archives by his radical and provocative approaches. As a result, the Filmmuseum has been able to be, or perhaps

has chosen to be able to be, responsive to historiographic shifts.

The three practices that have been examined in this thesis all have to be seen not as fixed and stable absolute notions but as historically contingent cultural practices and as the result of a process of negotiation involving technological, social, economic and institutional factors as well as the underexposed factor of human agency. The practices also have to be seen as an accumulation, as an amalgamation, of the individual concepts as identified in the individual chapters. Copyright as a law can be seen as a *patchwork quilt* (Alberdingk Thijm, 2008) because all sorts of elements have been added to the existing law over the years, but also its role can be seen as multifaceted, as individual chapters have highlighted a constraining role, as well as facilitating and resisting roles.

The film archive itself and its staff, including their human agency in deciding to make material available, have in this thesis been identified as important elements in the larger network of actors in the film archival access debate and therefore in the potential history making of the archival material. The film archive can be seen to fulfil numerous roles as identified in the individual chapters and just as copyright, it also needs to be seen as an amalgamation of all of the facets highlighted in the discrete chapters. Some of the roles were terra incognita, a conglomerate of broom closets, a Swiss bank, a temporary placeholder, a vehicle of power and a birthplace. By stretching the notion of the film archive conceptually it can be argued that the film archive *cannot* be seen as a “celestial multiplex” (Thompson, 2007), in which all films are digitally available at any time: it has rather been characterised as a go-between, as a mediator between copyright and film historiography and as an intersection where a fragmentising effect is created.

Fragmentation, Restriction and Resistance

As highlighted in the Introduction, under Dutch law, archives, libraries and museums are allowed to reproduce work for preservation purposes with the aim of protecting the work from decay, or if the technology with which the work is made accessible becomes obsolete, to keep the work consultable (Spoor, Verkade and Visser, 2005), but this is not necessarily true for other countries' archives. Sometimes the preservation activities carried out behind the scenes are already constrained by copyright restrictions.

Visits and individual consultation of archive material by researchers are usually not constrained by copyright: as long as nothing is being reproduced and / or communicated to the public there are, usually, no legal restrictions. However, that individual research is necessarily coloured by a different kind of restrictions. Whatever is available to a researcher in an individual consultation might be of a larger selection than what might be publicly accessible online of that same collection for instance, but it is still necessarily a 'partial picture': what material has been described to a level so that it can be retrieved; what material is in a technical shape so that it can be consulted, etc.

The thesis has not attempted to claim that copyright is the only impediment to public access to archival material. The digital skew is firmly rooted in a legal paradigm, but other factors play a massive role in the skewing process as well. Archival elements might be in a format that is not consultable, perhaps because the source material is unique and archival policy might dictate that only preservation copies can be shown, or perhaps the source cannot be played anymore because of technical obsolescence of the technology it needs to be played with. There are language and cultural barriers and there are issues of translation; will a copy be made

available with intertitles, subtitles or dubbed? In a time in which ubiquitous access seems to be the norm, archive users' expectations in relation to new, digital, technological developments might be skewed in themselves. Digitisation of analogue material, migration of digital files, and the creation of video masters in all sorts of formats based on the exhibition format, such as cinema projection or streaming, as well as keeping them compatible, is a costly affair. Issues of funding, especially where preservation of archival elements is tied to providing online access, are arguably the most fundamental impediment to access.

Based on the premise that only in being accessible can the film reach its potential for history making, the thesis has demonstrated that within the context of a film archive there is a fragmentation that takes place: the films that are extant are not necessarily available and the ones that are available are not necessarily publicly accessible. The legal filter of copyright was used as a focus of analysis for the film archival access practice and has indicated various ways in which legal issues restrict, facilitate and resist the use of archive material and as a determining factor of why the accessible part of the film archive is only a partial picture.

Film scholar Lucas Hilderband's term "aesthetics of access" (2009, p. 11) has been a useful term to analyse the practice of found footage filmmaking within an archival institutional context, but can also equally be applied to the works made outside of the archive. When the material's legal provenance, whether it was obtained through 'formal' or through circumventing, more 'informal' channels, is linked to the formal characteristics of the images in the ultimate artwork, copyright itself can be seen to have become an underlying topic. The artistic practice can be seen to challenge traditional conceptions of authorship, ownership and copyright and allude to ways that film form and copyright are interdependent.

Whereas the analogue artworks of visual artists working outside of an institutional setting involve degeneration through duplication, which clearly reflects an aesthetics of access, in the digital realm, duplication does not necessarily involve degeneration anymore. However, by accessing material in other ways the spectrum in terms of potential content has opened up drastically and what is currently termed the remix movement is, as opposed to certain forms of found footage filmmaking, not a practice of re-using ‘left-overs’ anymore. New ways of accessing material has often become the only possibility to produce these works, as they could not have been produced through formal channels having to comply with rights and permission issues. Aesthetics of access is also here an applicable term, as the legal provenance of the material is still directly linked to the formal characteristics of the image, albeit in a different way.

These non-institutional works can be seen as ‘legally resistant’ and the ways in which new possibilities in accessing films are used, such as DVDs and the Internet, challenge the very *raison d’être* of the film archive. One of those reasons might be to provide the legally uncertain works, the orphan works, but also the public domain works, with a birthplace, as outside of the institutional context without a commercial incentive for preservation these works would arguably languish. In turn, when the archival material that is at the heart of this thesis, such as orphan works and public domain material, is made available through found footage filmmaking, it is kept in the public eye and it can become a part of the larger network and potential for history making. As such it draws attention to the latent potential of the film archive.

What the practices share is what William Wees (1993, p. 11) has called the effect of all found footage films: that the films “draw attention to the body of the film itself, to the film’s own image-ness. ... [T]hey invite us to recognize it *as* found

footage, *as* recycled images.” In their compiled state, they will draw attention to the story that is ‘normally’ told with the same material. Unlike some of the artists’ intentions perhaps, as such, in their amalgamated and self-reflexive state, found footage films can be seen as a historiographic intervention.

Factual / Counterfactual Histories

Thomas Elsaesser is quoted in Christian Keathley’s 2006 publication *Cinephilia and History, or The Wind in the Trees* as having encouraged the exploration of so-called counter-factual histories. Counterfactual history is a form of historiography that pursues answering *what if* questions - that is, “histories that would mine undeveloped or unconsidered points of entry into the cinema as object of study” (Keathley, 2006, p. 133). According to Elsaesser, “[s]uch a counter-factual conception of history is not the opposite of a ‘real’ history, but a view prepared to think into history all those histories that might have been, or might still be” (Keathley, 2006, p. 134). The examples that were illustrated in the first chapter, the 1978 Brighton, UK FIAF Congress as well as the Nederlands Filmmuseum who in the late 1980s and early 1990s started to focus on the aesthetics of their own archival collection instead of established historical categories, were examples of counterfactual histories. Both examples asked the question *what if*? In the case of the Brighton Congress the main question underpinning the endeavour to screen all potential surviving fiction films from the period 1900-1906 was what if the actual films are looked at and examined to revise what was thought before about the until then called ‘primitive’ period of cinema? In the case of the Nederlands Filmmuseum, the question was what if the actual collection in the film archive is looked at as opposed to, what other institutions can be seen to have focussed on, the established canon of film? And what if the selection criteria to guide film preservation decisions would be based on aspects of

personal tastes of beauty and pleasure instead of cataloguing categories such as director or country? In turn, this study as a whole can be seen as a counterfactual history. What if the relationship between the film archive and film historiography is looked at through a different point of view? What if the film archive is examined through a legal lens? By ‘reshuffling’ the same material, an unconsidered point of entry into the cinema as object of study has been achieved.

A Wider Contribution

Although some of the aspects that have been researched in this thesis in the context of a specific archive might be considered unique to the Dutch context, some of the findings can be extended to other contexts. The idea that intellectual property is a historically and culturally specific idea is not an original idea that stems from the research in this thesis. It is, however, important to have that idea underpin a (legal) study, no matter what the context or market the research analyses. From that starting point, other contexts can be researched in terms of, for instance, the relation between industrial dynamics and the shaping of film form.

On a more local level, copyright *can* be seen as an important filter and can be added to the line of historic and contemporary factors that influence what material is potentially available and publicly accessible. A clear copyright ownership situation fosters film restoration projects. Sometimes, that means that the material is firmly owned and a large sum of money can be invested (such as the upcoming restoration of Abel Gance’s *NAPOLEON* (F 1927), which is a collaboration between the Cinémathèque française and rights owner Francis Ford Coppola). Sometimes it means that the film only survives in unique material that is in the public domain, such as the restoration of *BEYOND THE ROCKS* (US 1922, Sam Wood) by the Nederlands Filmmuseum and financed by ING Real Estate in 2005.

What can also be extended to other archival contexts is the idea that archival access is controlled by *both* those who own the rights as well as by those who own the physical assets and that therefore ‘doing’ film history in the context of the film archive has to be seen in the light of a certain, ever increasingly narrowing fragmentation of accessible material that takes place in the film archive. As a result, the orphan works problem, which is often presented as the result of a specific legal discourse, needs to then be seen within the context of a film archive as not an exclusively legal problem. Taking the problem out of a legal realm and resituating the debate, no matter what the context—a commercial, non-profit, national or regional archive—is important to unravel some of the aspects of the contemporary economics of archival access as well as recognising the interplay between a certain legality and human agency.

The findings of this thesis might first and foremost be of interest to the practitioners working in the fields of which the debates have been central in this thesis and to which, in turn, the thesis attempts to contribute in a meaningful way. As stated earlier in the thesis, the existing literature addressing copyright in the context of film archives stems from two different fields: intellectual property law and film archival practice. One of the addressed shortcomings of the legal literature is that beyond the notion that legal restrictions render certain collections dormant, there is no mention of any effect that the resultant unavailability of heritage materials might have on the writing or on the understanding of film history (USCO, 2006; van Gompel 2007; Elferink and Ringnalda, 2008; Vetulani, 2008; JISC, 2009). Aside from a handful of recent publications in the field of film studies that have addressed copyright or legal restrictions in a general way (Thompson, 2007; Hilderbrand, 2009; Decherney, 2012), it is surprising that the field of film studies, and more specifically film history, has not

produced more publications on the subject as legal restrictions influence so profoundly the essence of what a part of the field takes as its subject and object of study. Both bodies of literature can be seen to be disciplinary and do not address the implications of their own field for the other. The findings of this thesis can be seen as an attempt to start building a bridge between these fairly discrete bodies of literature, as the thesis does not only address the legality of certain provisions and constructions; it also acknowledges the implications of potential legal restrictions for film archival access practices and the material's potential for history making.

A critical attitude towards source material as well as the study and the use of source material can arguably be seen as fundamental to many academic disciplines. In film studies, and film history in particular, in which archival films can be used as sources for film history writing and in which the film archive can be seen as a storage place for filmic sources, source material and its use have been fundamental topics. In the first chapter it was highlighted that the revisionist historians questioned the sources and the use of those sources of their predecessors. Questions, such as what the object of study is and what constitutes as evidence have remained topical to the field. Scholars who engage in filmic sources and phenomena, which are also the object of a broader discussion outside of educational institutions, need to be able to critically reflect on these sources and phenomena. Contextualising them historically as well as understanding what factors influence their accessibility, including their legal provenance, are essential. The landscape of the storage place for filmic sources is changing in response to digitisation and funding pressures. A familiarity with the inner workings of a film archive, and film archival access practices in particular, is paramount for the field of film studies to appropriately respond to this changing

landscape, in which there is an increased awareness of the importance of the film archive.

The key to debates over intellectual property has always been to strike a balance between ownership and exchange of ideas (David and Halbert, 2014), so some of the findings of the thesis might worry rights holders or found footage filmmakers or other artists, potential beneficiaries of an ‘open’ film archive, as in providing access to archival material, issues of authorship and ownership might be challenged. For further potential of history making, the need for availability of the material needs to be at the forefront of the discussion but it needs to happen in a dialogue with stakeholders, particularly in the case of unclear ownership. The orphan works issue, and legal issues more generally, cannot be detached from future archival policy decisions, both in general and applied to archival film access and distribution specifically.

The legal studies that address providing access to orphan works (van Gompel, 2007 (a), 2007 (b); Elferink & Ringnalda, 2008) reached the corresponding conclusion that if the works cannot be used legally, the use may be prevented; a conclusion that is not sufficient for the archival practice as productive and potentially beneficial uses would be hindered and the collections would remain dormant. The findings of the thesis might be of interest to legal specialists as some of the practical aspects of archiving, such as a familiarity with preservation and access practices, and the necessity of films being publicly accessible for their potential for history making, should be taken into consideration in future solutions.

In this thesis the focus has been on a somewhat historical analysis, a retrospective consideration of film and the implications for film historiography. In turn, the thesis as a reflective academic practice might also provide a starting point for

a consideration of comparable phenomena in a more general contemporary media landscape, and more specifically media consumption practices, and might be useful and beneficial for others who investigate similar questions. In this study, it was not necessarily a specific methodology that was central; it was rather a specific perspective, the specific filter of copyright ownership through which the practice of film archival access was examined. This analysis can be extended in several directions. Obvious examples would be related to practices that are already embedded in a legal discourse, such as file sharing or peer-to-peer networks, such as Napster or The Pirate Bay. Deeming some of these networks merely illegal is not sufficient in consideration of their consumer's desire and widespread use. As opposed to the binary opposition of legal and illegal or the detrimental effects these networks are usually seen to have on the music or film industry (Patry, 2009; Johns, 2010), it might be meaningful to re-cast such networks as mediators between 'owners' and 'users' of copyrighted material in order to study them in a wider historically, geographically, socially, technologically and legally contingent perspective. Other areas of practice with immediate political as well as cultural dimensions in which access to and exploitation of the work might be impeded might benefit from being taken out of the exclusively legal debate as well. An example could be academic publishing in the digital realm, an area of practice in which problems relating to protection, accessibility and exploitation of material can currently be seen to be amplified by issues of digitisation technology and human agency. Digital academic scholarship can be seen to be impinged by restricted access related to digital subscriptions to academic journals via a 'pay wall', for instance. "In the digital world, publishers and database vendors may deprive future researchers of access to the full record simply by deleting any material they deem objectionable or erroneous" (Manoff, 2004, p. 13). A

legal perspective could be used to unravel a larger network of factors at work and to establish whether further scholarship based on digital sources should be understood in the light of a certain fragmentation of accessible material that takes place behind such contemporary economics of access factors as subscription models.

Contribution of the Thesis

Based on the assumption that the cultural practice of copyright can be seen as an important filter that shapes film archival access and therefore a certain film archival fragmentation, the public film archive was cross-sectioned legally and the resultant quadrants examined systematically. In doing so, as well as by attempting to bridge the gap that exists between the discrete bodies of legal and film archival literature, the thesis illustrates how access to certain collections of film unravel some of the contemporary economics of access and evokes particular notions of copyright and film history writing at the intersection of the film archive, which as such, can be seen to function as a mediator between copyright and film historiography.

The thesis is important for several reasons. It is particularly timely as it examines copyright as a component that underpins archiving policy and film history writing on the verge of implementations of new orphan works legislation and it rethinks the relation between the film archive and film historiography in the context of (current and forthcoming problems related to) digitisation. As such, the thesis adds to a historiographic reflection on film history in the context of a changing film archival landscape, which is currently under pressure due to various international digitisation and access as well as funding initiatives.

What is new about the contribution of this thesis is not that the film archive can be seen simultaneously as a result of a particular historical narrative as well as contributing to one, but that this debate is set in the context of copyright as a determining factor of why the accessible part of the film archive is only a partial picture. The concept of copyright ownership as a focus for analysis of archival access and the repercussions for film historiography is an under-researched topic and has not been the subject of a focused examination before.

The thesis has generated new primary source material in the form of interviews and case study material that was previously not available. It also proposes a reorganisation of existing categories of analysis in the form of a cross-section of the film archive based on copyright ownership plotted against the material's 'availability'. The framework within which these quadrants have been examined is the specific interrelationship between the three cultural practices of copyright, the film archive and film history writing. Every chapter in the thesis has highlighted a specific constellation of that interrelationship and ultimately leads to an expression of a part of the fragmentation the thesis addresses. All of these parts collectively form the full picture of the archival fragmentation in the Conclusion. The model and framework for analysis could be mapped onto other kinds of institutions such as libraries, or more specifically a commercial or a regional film archive, for instance, where the composition of copyrighted, orphan and public domain works might be entirely different, in order to clearly outline what part of the archive is publicly accessible and why.

What initially can seem like a local and an exclusively legal problem can be seen in a larger context as an ontological and an epistemological problem, in terms of the larger constraints to history. It therefore resonates beyond the specific demarcation and confinements of the specific research field to a broader debate affected by archiving and economics. As such, the thesis is relevant to the film archival access debate, but it also contributes to the film historiographic one by opening up questions significant for academics, for example about the consequences for the writing of film history when films are being (un)available for legal reasons.

Indifference of the film industry to the survival of its past product, neglect, loss, decay or wilful destruction and other political, economic and curatorial issues

are amongst the factors that have helped shape the particular partial picture of the available film history to be studied. Copyright can be added to the line of historic and contemporary factors that influence what material is publicly accessible. These factors can all be seen as particular 'sieves' through which the numerous narratives that can be found in an archive can be filtered. In practice, however, 'copyright issues' are too often used as a curtain to hide behind. In this thesis, copyright in the context of an audiovisual archive has been identified as a smokescreen, as it masks something infinitely more large: the impossibility to provide access to everything (further broken down, or fragmented, into that what has been made, what has survived, what has been preserved, etc.). Copyright can ultimately even be seen as a smokescreen for the problem of history, the telling of which is necessarily a partial and provisional story, told from the present.

Further Research

In what precedes, some of the insights that this research has contributed to current debates in media studies were highlighted. To conclude, further research as a result of this study might be conducted into a few issues, or areas of research, which this study has touched upon, but could not in every case discuss in further detail because of the research scope that was demarcated at the beginning of this thesis. Questions that will be discussed here concern either an extension of the topic explored in this thesis or complementary ones.

In consideration of contemporary archival access debates, this thesis has shifted the focus of the orphan works problem away from an exclusively legal debate. By doing so, it might have opened up questions in terms of sustainability of the current legal framework, particularly in digitisation contexts. A comparison with other variables than the ones explored in this thesis in order to enlarge the research scope of the orphan works problem could include film archival access of a commercial archive or of the national archive of a country with a mandatory legal deposit scheme. Consequences and insights of examining such alternatives might confirm some of the findings of this thesis, and would add to the richness of the discussion. This study has also alluded to ways that film form and copyright could be interdependent. Possible endeavours for further study could be the different ways of understanding the impact of copyright (in a wider context of industrial dynamics more generally) and the shaping of film form.

Some issues of film archival access can be seen to start with issues involved in collecting and preservation. Not knowing immediately who to ask for permission when wanting to provide access to a film might be a consequence of the way a film has been catalogued, for instance. Other access issues can be related to long-term

preservation strategies. Both the film archiving as well as the film studies community frequently address the high percentage of film source material that is lost, predominantly from the silent era (Cherchi Usai, 1996; Hediger, 2005; Horak, 2007). A current topic in film archiving is the long-term preservation of contemporary film elements, particularly digital born material, and potential risks for loss. In the short term, technology obsolescence might prevent recent restorations from being accessible; in the long term some worry for a black hole in which digitally produced films will face significant risk of loss (Palm, 2006; Mazzanti, 2011). Repercussions of some current strategies appear to be severe: David Bordwell (2012) has recently asked the question whether there can ever be a digital equivalent of ‘Dawson City’, with which he meant the retrieval of a large party of American film prints in Dawson City in Yukon, Canada in a paved-over disused swimming pool, which had survived integrally due to the ideal archival circumstances created by the permafrost. An investigation of current long term film preservation practices and strategies seems beneficial in the light of future potential access possibilities.

FILMOGRAPHY

A BOUT DE SOUFFLE (F 1960, Jean-Luc Godard)
ALS TWEE DRUPPELS WATER (THE SPITTING IMAGE, NL 1963, Fons Rademakers)
THE ASPHALT JUNGLE (US 1950, John Huston)
BEYOND THE ROCKS (US 1922, Sam Wood)
BITS & PIECES (NL 1990 - present, EYE)
THE BRIDGE ON THE RIVER KWAI (US 1957, David Lean)
CASABLANCA (US 1942, Michael Curtiz)
CHARADE (US 1963, Stanley Donen)
CITIZEN KANE (US 1941, Orson Welles)
THE CLOCK (UK 2010, Chris Marclay)
DECASIA (US 2002, Bill Morrison)
DOWNHILL (UK 1927, Alfred Hitchcock)
FILM IST. 1-6 (AT 1998, Gustav Deutsch)
FILM IST. 7-12 (AT 2002, Gustav Deutsch)
FILM IST. A GIRL & A GUN (AT 2009, Gustav Deutsch)
GRAVITY (B 2007, Nicolas Provost)
THE GREAT TRAIN ROBBERY (US 1903, Edwin S. Porter)
ICH KLAGE AN (DE 1941, Wolfgang Liebeneiner)
IL GATTOPARDO (I 1963, Luchino Visconti)
JULES ET JIM (F 1962, Francois Truffaut)
LA HABAÑERA (DE 1937, Douglas Sirk)
LYRISCH NITRAAT (LYRICAL NITRATE, NL 1990, Peter Delpout)
MAUDITE SOIT LA GUERRE (B 1914, Alfred Machin)
NAPOLEON (F 1927, Abel Gance)
NANOOK OF THE NORTH (US 1922, Robert Flaherty)
OTTO E MEZZO (I 1963, Federico Fellini)
PAPILLON D'AMOUR (B 2003, Nicolas Provost)
DE OVERVAL (THE SILENT RAID, NL 1962, Paul Rotha)

THE SOUND OF THE END OF MUSIC (UK 2010, Vicky Bennett)

TAXI DRIVER (US 1976, Martin Scorsese)

WARFARE OF THE FLESH (US 1917, Edward Warren)

TABLE OF LEGISLATION

(NL) Auteurswet (Copyright Act 1912) Unofficial translation by the Ministry of Justice. [Online] Available at:
http://www.ivir.nl/legislation/nl/copyrightact1912_unofficial.pdf (last accessed: 30 March 2014).

(UK) Copyright, Designs and Patents Act 1988

(US) Copyright Term Extension Act 1998, 17 USC §§ 108, 203, 301-304

EU Directive 93/98/EEC (Directive harmonising the term of protection of copyright and certain related rights) (replaced by Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights)

EU Directive 2001/29/EC (Directive of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society)

EU Directive 2012/28/EU (Directive of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works)

(NL) Wet op de Naburige Rechten (Neighbouring Rights Act 1993)

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